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IN THE

# Supreme Court of the United States

OCTOBER TERM 1950.

No. 700

ELECTRIC BOND AND SHARE COMPANY,
*Petitioner,*

*v.*

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN F. MACLANE,
*Counsel for Petitioner.*

SIMPSON THACHER & BARTLETT,
120 Broadway,
New York 5, N. Y.,
*Of Counsel*

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SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD, *et al.*, ALFRED B. CORNELL, *et al.*, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to bring up to this Court a case pending in the Court of Appeals before judgment is given in that Court and to review those portions of an order of the United States District Court for the Southern District of New York from which your petitioner appealed to such Court of Appeals. The order of the District Court approved and directed the enforcement of Amended Plan II-B, filed by your petitioner with the Securities and Exchange Commission (the Commission) pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 with the reservation by your petitioner of the right to contest the propriety of such plan and to object to the approval and enforcement thereof.

## Opinion Below.

There is no opinion of the Court of Appeals since this petition is filed before judgment has been given by that Court.

The opinion of the District Court (R. 4) is reported in *In re* Electric Bond & Share Co., 95 F. Supp. 492 (S. D. N. Y., 1951).

The findings and opinion of the Commission have not been officially reported but are set forth in the Commission's Holding Company Act Release No. 9980, dated July 28, 1950 (R. 36).

## Jurisdiction.

The order of the District Court, a part of which is sought to be reviewed, was entered on March 2, 1951 (R. 16). The jurisdiction of this Court is invoked under Section 1254 of the 1948 revised Judicial Code, Title 28 U. S. Code, as amended, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. §79y.

## Statute Involved.

The statute involved is Section 11(e) of the Public Utility Holding Company Act (the Act). This section is reproduced in the Appendix hereto (p. A-1).

## Questions Presented.

1. In the light of the opinions of this Court in the *Engineers** and *Otis*** cases, does the "fair and equitable" standard of Section 11(e) of the Act permit pre-

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* *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949).

** *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945).

ferred stockholders of a company subject to Section 11 to obtain, in retirement of their stock as part of a liquidation or capital distribution, an amount which exceeds the voluntary "liquidation" preference of such stock under the company's charter, where the "liquidation" provisions of the company's charter could, and also probably would, have been brought into play by the company apart from Section 11 of the Act?

2. Did the Commission, in connection with its determination of the investment value of the $6 preferred stock of your petitioner, rely on proper and consistent assumptions as to the presence or absence of the impact of Section 11 of the Act on the pertinent transactions involved, in accordance with the opinion of this Court in the *Engineers* case?

3. Were the stock yield levels employed by the Commission as standards in reaching its investment value appraisals of the $6 preferred stock of your petitioner abnormally low yield levels of a transient nature within the prohibition of this Court's opinion in the *Engineers* case?

4. Did the Commission follow proper legal standards in obliging your petitioner to pay on its $6 preferred stock, with respect to which payment of $10 a share above charter "liquidation" preference has been directed, an additional amount as interest on the $10 per share payment, and, if so, is the rate of interest which your petitioner has been directed to pay substantially excessive?

## Statement.

### Description of Amended Plan II-B and Proceedings Relating Thereto.

This case involves the question of the fairness of Amended Plan II-B filed pursuant to Section 11(e) of the Act by your petitioner (Bond and Share) with the Commission. As originally filed, Plan II-B provided that Bond and Share would make no further payments in retirement of its $6 and $5 preferred stocks in addition to payments theretofore made of $30 and $70 per share—an aggregate of $100 in all and representing the "liquidation" value of the preferred stocks pursuant to the terms of the Bond and Share charter—which had been made by Bond and Share pursuant to previous Section 11(e) plans theretofore approved by the Commission and District Court.

The Commission approved that portion of Plan II-B which provided for no further payment with respect to the $5 preferred stock, but directed that Bond and Share pay $10 per share with respect to the $6 preferred stock, together with "compensation for delay in payment", or interest, at the rate of 5.45% per annum on the $10 per share payment from March 6, 1947, to the date of payment. Pursuant to a commitment contained in one of its previously approved plans, Bond and Share thereafter filed amendments to its Plan II-B providing for such payment with respect to the $6 preferred stock, but reserving its right to object to such amendments before the District Court and to appeal from any order of any court approving Amended Plan II-B.

Thereafter the District Court entered an order approving Amended Plan II-B, over the objections of Bond and Share to that part of such Plan which directed a further payment to be made with respect to the $6 preferred stock.

Bond and Share seeks review by this petition of that order only in so far as it approved the part of the Plan just mentioned.

The amount presently involved exceeds $10,250,000, of which more than $1,850,000 is represented by interest alone.

**Description and Brief History of Bond and Share.**

Bond and Share, a registered holding company under the Act, is a New York corporation (R. 39). It neither owns nor operates physical properties, all of its assets (other than current assets) being debt and stock securities of other companies.

When Bond and Share registered under the Act in 1938, it was the top holding company in the largest public utility holding company system in the world. At that time Bond and Share controlled about 120 domestic subsidiaries operating in 33 states and about 110 subsidiaries operating in 13 foreign countries with combined assets of nearly $3,500,000,000.* These interests were owned primarily through the following five major subsidiary holding companies, all of which owned securities of public utility holding or operating companies:**

American & Foreign Power Company Inc. (Foreign Power), the operating subsidiaries of which are all located in foreign countries;

American Gas and Electric Company (American Gas);

American Power & Light Company (American);

Electric Power & Light Corporation (Electric);

National Power & Light Company (National).

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* 15th Annual Report of the Commission for the fiscal year ended June 30, 1949, p. 99.

** Plan II-B, Appendix A (R. 186-91).

In addition, Bond and Share owned a large direct interest in United Gas Corporation (United Gas), a subsidiary of Electric, and all the securities of Ebasco Services Incorporated (Ebasco), a wholly owned service company, together with miscellaneous investments.*

Each of the five subholding companies was capitalized with debt or preferred stock, or with debt and preferred stock, as well as common stock. The securities owned by Bond and Share consisted mostly of junior securities of the subholding companies.* The operating companies, in addition to the subholding companies, also had debt and preferred stocks outstanding in the hands of the public. Thus Bond and Share's position was primarily that of the holder of equities junior to many layers of senior securities.**

The depression of the early 1930's struck with full force Bond and Share's attenuated equity in its subsidiary companies and the effect of the depression on Bond and Share's earnings was magnified by other economic developments (R. 385-90). Further substantial reduction in earnings resulted from the impact of the Act on the Bond and Share system.

In 1940 the Commission initiated proceedings against Bond and Share and certain of its subsidiary companies under Sections 11(b)(1) and 11(b)(2) of the Act. As a result of these proceedings the Commission directed the dissolution of Electric, American and National. National was substantially liquidated in 1946, Electric was dissolved in 1949 and the American compliance plan was consummated in 1950, resulting in a substantial liquidation of that company.

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* Plan II-B, Appendix A (R. 188).

** *Ibid.*

Under the Act, Bond and Share has been required to dispose of the major portion of the securities which it has received as a result of the consummation of the compliance programs of these three subholding companies. Many of such disposals have already been effected. Also, Bond and Share has disposed of all of its holdings in American Gas. Foreign Power, representing Bond and Share's largest investment, is still in Section 11(e) reorganization proceedings before the Commission.

United Gas, formerly Bond and Share's second largest investment, was reorganized under Section 11(e) of the Act pursuant to which Bond and Share in November 1944 received approximately $44,000,000 in cash for its entire interest in United Gas, which cash could not be profitably invested because of the restrictions of the Act.*

As a result of the impact of the Act the Bond and Share system had been severely contracted by July 1945 when it filed with the Commission its Section 11(e) plans (hereinafter more fully described) for compliance with the Act. Bond and Share's net income had decreased from approximately $42,000,000 at the end of 1930 to approximately $4,600,000 at the end of 1944. The earnings coverage for its preferred stock dividend requirements had fallen from 5.8 times at the end of 1930 to .72 times at the end of 1944. The substantial decline in earnings was continuing in the year 1945.**

**Bond and Share's Position in July 1945.**

By July 1945, due to the combined effect on the Bond and Share system of the impact of the Act and the economic

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* *United Gas Corp.*, 16 SEC 531, H. C. A. R. 5271 (Sept., 1944).

** Plan II-B, Table A (R. 174).

developments above-mentioned, Bond and Share found itself in the following position:

1. Its earnings had been reduced so that for more than the past three years it had not earned its preferred stock dividend requirements.

2. Its income from United Gas, its second largest investment, had been wiped out in connection with the reorganization of that company and Bond and Share held $44,000,000 in cash which it received as a result of such reorganization, with no profitable place to invest such funds because of the restrictions of the Act.

3. Its system had already been substantially contracted under the Act and it was apparent that further liquidation of the system would be necessary to comply with the Act.

**Bond and Share's Plans for Compliance with the Act.**

On July 25, 1945, Bond and Share filed with the Commission its three plans under Section 11(e) for compliance with the Act. Plan I provided that, as the initial step in the retirement of both its $6 and $5 preferred stocks, Bond and Share would make a cash distribution of capital to all its preferred stockholders in the amount of $30 per share and that the rights of such stockholders would be appropriately modified. After approval by the Commission and the District Court for the Southern District of New York this Plan was consummated in November 1945. In its Findings and Opinion approving the Plan the Commission found that the retirement of the preferred stocks was necessary to effectuate Section 11(b) of the Act.*

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* *Electric Bond and Share Co.*, SEC , H. C. A. R. 6121 (Oct., 1945).

Plan II, which originally provided for the completion of the retirement of the preferred stocks, principally by the distribution to preferred stockholders of certain securities, was, in the interest of expedition, amended by the filing of Plan II-A providing for the payment of cash to the preferred stockholders.* This Plan provided, among other things, for the completion of the retirement of the preferred stocks by payment to the holders thereof of a cash distribution of capital of $70 per share, plus the amount of any accumulated dividends, and also by issuing to them a certificate evidencing their right to receive such additional amount, if any, as might be ultimately awarded to them by the Commission or any appropriate court.

Thus Plans I and II-A resulted, among other things, in distributing capital to the preferred stockholders in the aggregate amount of $100 per share, plus accumulated dividends. This was the amount that preferred stockholders were entitled to receive under the provisions of

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* Experience proved that a cash plan, like Plan II-A, was quicker than a plan providing for an exchange of securities, like Plan II (R. 366).

Bond and Share's management would not have filed a plan, like Plan II-A, providing for the payment of as much as $100 per share for the $5 preferred stock on an investment value basis. The provision for payment of that amount was based on other considerations, both legal and practical (Transcript, unprinted, pp. 493-500).

Moreover, the fact that Plan II offered a slightly larger security package to the $6 preferred stock than it did to the $5 preferred stock of Bond and Share merely meant that in the management's opinion the $5 preferred stock was worth less than $100 per share—not that the $6 preferred stock was worth more (Transcript, unprinted, p. 495). The reason why Plan II offered the slightly larger security package to the $6 preferred stock was that when that plan was filed (in 1945) the "security", as opposed to the "cash", plans were in vogue; the fairness of such "security" plans was measured primarily by a comparison of earnings on the securities being surrendered and received, respectively, and charter liquidation provisions were not given controlling weight by the Commission or courts as they were in most cases involving "cash" plans.

Bond and Share's charter in the event of any liquidation or any distribution of capital, whether voluntary or involuntary (R. 399-400).

Plan II-A, after approval by the Commission* and the District Court,** was consummated by payment to the preferred stockholders on March 6, 1947. Thereafter Bond and Share filed Plan II-B as described above.

In addition to issuing the order under Section 11(e) approving Plan II-A, the Commission issued an order under Section 11(b)(2) directing that Bond and Share eliminate its preferred stocks from its capital structure as being repugnant to that Section.***

Plan III of Bond and Share is not here relevant but provides primarily for the further disposal of Bond and Share's holdings of utility securities.

Thus the Bond and Share public utility holding company system is, pursuant to the Act, in practical effect being liquidated so that the capital of the preferred stockholders could no longer be employed in the business. With the remainder of the Company's capital being drastically shrunk, the business of Bond and Share is being transformed into an enterprise which to a large extent is expected to be an investment company of a specialized nature. The result of this liquidation and transforma-

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* *Electric Bond and Share Co.*, SEC , H. C. A. R. 6879-1 (Sept., 1946).

** The opinion of the District Court (Judge Leibell) written in connection with this order is reported at 73 F. Supp. 426 and reprinted at R. 258.

Judge Leibell, in his opinion approving Plan II-A, stated that he regarded as premature (and consequently that he did not intend to decide) the question of whether the preferred stockholders were entitled to any amount in excess of $100 per share, plus accumulated dividends, representing the aggregate amount they received pursuant to Plans I and II-A. Therefore, none of the present issues were decided by Judge Leibell (R. 294).

*** *Electric Bond and Share Co.*, SEC , H. C. A. R. 6879-2(a) (Sept., 1946).

tion is graphically shown by Chart I (Appendix hereto) illustrating the nature and size of the Bond and Share enterprise before and after proposed compliance with the Act. The extent of the liquidation that had taken place at the time of the completion of the preferred stock retirement is shown by the fact that upon the consummation of its Plan II-A, Bond and Share had disposed of investments with a ledger value of over $200,000,000 (or nearly 40% of the ledger value of investments held at November 30, 1935 or subsequently acquired), in addition to reducing its net current assets by $23,000,000 and its capital stock liability from over $171,000,000 to about $26,000,000 (R. 383).

## Reasons for Granting the Writ.

### I.

This case involves questions of substantial importance in connection with the proper administration and interpretation of the Public Utility Holding Company Act. It is respectfully submitted that the public interest will be promoted by prompt settlement in this Court of such questions. There are presently pending in different fora at least three cases, including the present proceeding, in which the primary legal issue is similar, if not identical. In two of these cases petitions for writs of certiorari have been filed in this Court, including the present case. The aggregate amount in controversy in the three cases approximates $13,000,000.

In addition to the present proceeding the cases just mentioned are the *Federal Light & Traction Company* case, which has recently been decided by the Court of Appeals

for the Second Circuit*, and the *American Water Works and Electric Company* case,** which is pending undecided before the Commission. A petition for a writ of certiorari is being filed with this Court in the *Federal* case on or about the same day that your petitioner files the present petition.*** The primary question of law in the *Federal* case and the present case is substantially the same. Your petitioner respectfully requests this Court, under its Rule 39, to grant Bond and Share's petition before judgment is given by the Court of Appeals for the Second Circuit, the same Court that rendered the decision in the *Federal* case, in order that the common question of law in the two cases may be conclusively settled at one time.† This Court has frequently so held.‡

The common question of law involves the effect which should be given to charter "liquidation" provisions upon the retirement of preferred stocks of companies subject to the Act in situations where, although such retirement was effected as a part of a liquidation or distribution

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* *In the Matter of Federal Light & Traction Co.* SEC , H. C. A. R. 9981 (July, 1950); aff'd *sub nom. Federal Liquidating Corp.* v. *S. E. C.*, F. (2d) (C. A. 2, 1951), C. C. H. Fed. Sec. Serv. ¶90, 502, Mar. 16, 1951.

** *In the Matter of West Penn Electric Co., et al.; American Water Works and Electric Co., Inc., et al.*, Commission File Nos. 54-142 and 59-84.

*** (Sub nom. *Federal Liquidating Corporation, Petitioner,* v. *Securities and Exchange Commission, Respondent).*

† The Commission recognized that a common question of law existed in the *Federal* case and in the present case by issuing its orders in the two cases on the same day (June 19, 1950) after having had both cases under advisement for a period of over two years.

‡ *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 298-9 (1925); *Johnson* v. *U. S. Shipping Board Fleet Corp.*, 280 U. S. 320, 324-5 (1930); *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-2, 415 n. 2 (1931); Cf. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 370-1 (1949).

of capital consummated by the company in question in connection with plans filed with the Commission under Section 11(e) of the Act, the liquidation or distribution of capital could have been, and indeed probably would have been, carried out without the aid or compulsion of Section 11.

## II.

The Court of Appeals in the *Federal* case has decided a federal question in a way probably in conflict with applicable decisions of this Court or, at the very least, has decided an important question of federal law which has not been, but should be, settled by this Court.

Both Federal and Bond and Share were organized under the laws of New York. In the *Federal* case the company paid its preferred stockholders $100 per share and accumulated dividends (being the amount payable pursuant to the provisions of the charter upon any liquidation, whether voluntary or involuntary) in connection with the liquidation and dissolution of the company after requisite stockholders' vote and pursuant to the provisions of the New York corporation laws, as well as in accordance with a plan filed and approved by the Commission under Section 11(e) of the Act. In the present case, Bond and Share made payment in a like amount to its preferred stockholders as a distribution of capital pursuant to a plan filed and approved by the Commission under Section 11(e) of the Act. This was the amount payable to such stockholders in accordance with the Bond and Share charter upon any liquidation or distribution of capital, whether voluntary or involuntary (R. 399-400). In both cases the preferred stockholders were given, in addition to the cash payment just mentioned, a certificate evidencing any right they might have, as later determined by the Commission or an appropriate court, to

obtain a further cash payment in connection with the retirement of their stock.

In the *Federal* case the company not only *could have* but in fact *did* liquidate under the provisions of its charter and of the New York State corporation laws. In the present case Bond and Share contends that it *could have* (and, also, probably *would have*), effected the distribution of capital, which was carried out pursuant to its Section 11(e) plan, under the provisions of its charter and of the New York State corporation laws without the aid of Section 11 of the Act. It is contended in both cases that the amount provided in the companies' respective charters to be paid to preferred stockholders upon any liquidation or distribution of capital, whether voluntary or involuntary (namely, $100 per share, plus accumulated dividends), marks the upper limit of the payment which such preferred stockholders are entitled to receive.

This contention is entirely consistent with the decisions of this Court in the *Otis* case* and in the *Engineers* case** where the Court decided that *involuntary* charter liquidation provisions were not applicable to preferred stock retirements pursuant to Section 11(e) plans. The principal legal question involved in the present case (and in the *Federal* case) was not presented in either *Otis* or *Engineers*. In the *Otis* case the assets of the company were insufficient to pay the full liquidation claim of the preferred stockholders and leave anything over for the common stockholders who had been allocated about 5% of the assets by the Commission. The preferred stockholders in that case were seeking to establish that the charter provision was matured by the operation of the Act and thus deprive the

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* *Otis & Co.* v. *SEC*, 323 U. S. 624 (1945).

** *S.E.C.* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949).

common stockholders of any participation in the enterprise —a result which could not have been achieved by the preferred stockholders apart from Section 11 of the Act. In holding that the charter liquidation provisions were not applicable, this Court stated in the *Otis* case that:

> ". . . Congress did not intend that its exercise of power to simplify [under Section 11] should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. . ."*

In the *Engineers* case** the charter provision required the payment of an amount equal to the redemption premium upon voluntary liquidation. Only in case of involuntary liquidation would the preferred stockholders have been limited to $100 per share, plus accumulated dividends. In that case the common stockholders were seeking to mature the provisions of the charter relating to involuntary liquidation—again, as in the *Otis* case, a provision that could not have been matured by action of the stockholders apart from Section 11 of the Act. In this connection the Court said in the *Engineers* case that its decision was based on

> ". . . the fact that Congress in its efforts to achieve a particular economic goal, wished to avoid

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* *Otis & Co.* v. *SEC*, 323 U. S. 624, 638, (1945).

** The Bond and Share preferred stocks were not in any way comparable to the Engineers preferred stocks. The Commission has made no finding that they were comparable, and, therefore, it is unnecessary to develop the point. It should be added, however, that in the *Engineers* case the courts and the Commission both emphasized that the evidence was undisputed, and the company even admitted, that the investment values of the preferred stocks exceeded the redemption values of such stocks. On the contrary, in the instant case Bond and Share has at all times vigorously asserted and, we believe, proved that the investment values of the Bond and Share preferred stocks do not exceed $100 per share.

> shifting investment values from one class of securities to another by maturing contract rights [i.e., liquidation rights] which would not otherwise have matured. . .'"*

Indeed in the *Engineers* case this Court, while recognizing as firmly settled the fact that preferred stockholders were not entitled to receive the amount provided in their charter redemption provisions upon retirement of their stock pursuant to a Section 11(e) plan, stated that the redemption provisions should mark the ceiling of the preferred stockholders' recovery. In this respect the Court said:

> ". . . the Commission did not apply the redemption provision, which, like the involuntary liquidation provision, was inoperative, but held that fairness required that the preferreds be paid no more than the call price, since the company could have called the stock at that price at any time absent the Act."**

If fairness required that the charter redemption value*** marked the ceiling of the preferred stockholders'

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* *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 134 (1949).

** *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 153-4 (1949).

*** While charter redemption provisions properly form a ceiling for preferred stockholders' claims, an unbroken line of decisions terminating with the decision of this Court in the *Engineers* case has defined the law to the effect that upon retirement of senior securities pursuant to a Section 11(e) plan, the holders of such securities are not entitled to receive their charter redemption value as a matter of contract right.

Cases to this effect include the following: *The United Light and Power Co.*, 10 SEC 1215, H. C. A. R. 3345 (Feb., 1942), aff'd *sub. nom. New York Trust Co.* v. *S.E.C.*, 131 F. (2d) 274 (C. A. 2, 1942), cert. denied 318 U. S. 786 (1943); *The Laclede Gas Light Co.*, 16 SEC 26, H. C. A. R. 5062 (May, 1944), plan approved and enforced 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub. nom. Massachusetts Mutual Life Insurance Co.* v. *SEC*, 151 F. (2d) 424 (C. A. 8, 1945), cert. denied 327 U. S. 795 (1946).

claims in the *Engineers* case, fairness equally requires that the charter liquidation value in the *Federal* case and the charter distribution of capital value in the present case constitute the upper limit of the preferred stockholders' claims, since Federal could have liquidated (and in fact did liquidate) and Bond and Share could have (and probably would have) made a distribution of capital without the benefit of the Act.

If the rationale of the statement of this Court in the *Engineers* case (last quoted above) is not to be applied to situations where holding companies could have liquidated or distributed capital pursuant to their charter provisions apart from the Act, the result would be to permit the impact of the Act to shift values from common stockholders to preferred stockholders which rightfully belong to the common stockholders and would be capable of being realized by them apart from the Act. Common stockholders would be obliged to pay more as a result of the Act than they need pay apart from the Act. Common stockholders who could, if the liquidation of their corporation were desirable in a business context, liquidate and pay preferred stocks off at $100 per share, plus accumulated dividends, would find that under the Act they could be forced into an undesired liquidation and be forced to pay a premium to preferred stockholders for the privilege of paying them off in liquidation, just as if they could continue to use the money in a going business. Such an interpretation of the Act is not only essentially unjust but is wholly inconsistent with the fundamental premise of the *Engineers* and *Otis* cases which is that the impact of the Act should not result in a shifting of values from one class of securities to another.

The Court of Appeals in the *Federal* case, however, affirmed the decision of the Commission awarding to the

preferred stockholders $10 per share plus interest, in addition to the $100 per share plus accumulated dividends provided in the charter to be paid to such stockholders upon liquidation of the company. The District Court in the present case also affirmed a similar direction of the Commission. These decisions of the Court of Appeals and the District Court are in conflict with the above-quoted statements of this Court; or, at the very least, those Courts decided an important question which has not been, but should be, definitely settled by this Court.

## III.

The *Federal* case and the present case also involved another important question of federal law which has not been, but should be, settled by this Court. There were impelling business reasons for the liquidation of the company effected in the *Federal* case and the distribution of capital made by Bond and Share in the present case, under the circumstances in which those companies found themselves at the time that such liquidation and distribution of capital, respectively, were carried out. It is conceded in the present case that the business reasons for the distributions of capital in connection with the retirement of the preferred stocks arose out of a situation in which Bond and Share was placed, in part at least, by reason of the previous impact of Section 11 of the Act on Bond and Share and its subsidiary companies. A similar situation existed in the *El Paso* case,* however, and it is our understanding that the opinion of this Court in the *Engineers* case indi-

* *El Paso Electric Co.*, 17 SEC 659, H. C. A. R. 5499 (Dec., 1944).

cated that the Court did not intend that the doctrine of the *El Paso* case should be overruled by this Court.*

In the *El Paso* case the Commission decided that the preferred stockholders were limited, in the retirement of their stock, to the $100 per share plus accumulated dividends provided by their charter in the event of a liquidation, voluntary or involuntary. In both the *Federal* case and the present case the Commission overruled its determination in the *El Paso* case. It is respectfully submitted that this Court should settle the important conflict of law presented by these cases.

## ARGUMENT.

### Summary of Argument.

Since Bond and Share, under the provisions of its charter and of the New York State corporation laws, could have effected a distribution of capital of $100 per share, plus accumulated dividends, to its preferred stockholders, apart from the Act, the claims of the preferred stockholders were limited to the amount of $100 per share, plus accumulated dividends.

Bond and Share not only could have made a distribution of capital to its preferred stockholders apart from the Act,

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* *SEC* v. *Central Illinois Corp.*, 338 U. S. 96, 159 (1949), footnote 10, reading as follows: "Commissioner Caffrey thought the liquidation preference applicable for a reason irrelevant here. See *El Paso Electric Co.*, Holding Company Act Release 5499".

We are not overlooking the fact that footnote 10 just quoted appears in the Appendix to this Court's opinion in the *Engineers* case and that the Court stated (p. 155) that "This Appendix is merely a summary of Commission decisions and does not purport to declare any rulings of law." Nevertheless, the footnote merely confirms our understanding gathered from the main portion of this Court's opinion.

as set forth above, but under the circumstances existing in the middle of 1945, when Bond and Share filed its plans with the Commission for compliance with the Act, would have been impelled by business considerations to make such a distribution of capital in the amount of $100 per share, plus accumulated dividends, even if it had not been compelled to do so by the impact of the Act. This constitutes an additional reason for limiting the claims of the preferred stockholders to the amount of the distribution of capital charter preference.

The Commission and the District Court misapplied the legal principles relating to the impact of the Act on Bond and Share and its subsidiary companies in connection with the Commission's finding of investment value of the preferred stocks, with the result that the Commission did not appraise the investment value of the preferred stocks of Bond and Share as they actually existed at the time of their retirement.

The Commission and the District Court violated the rule of law announced by this Court in the *Engineers* case in that the Commission, as affirmed by the District Court, based its investment value appraisal of the Bond and Share preferred stocks on a period of abnormally high market values of a transient nature.

The Commission and the District Court erred as a matter of law in directing that Bond and Share must pay with respect to its formerly outstanding $6 preferred stock "compensation for delay in payment", or interest, at the annual rate of 5.45% from March 6, 1947 to the date of payment.

## POINT I.

**Since Bond and Share could have effected a distribution of capital of $100 per share, plus accumulated dividends, to its preferred stockholders apart from the Act, that amount should mark the ceiling of the claims of those stockholders.**

We have fully stated hereinabove* our contention that, under the express language of the opinion of this Court in the *Engineers* case, fairness requires that payment to the preferred stockholders should in no event exceed $100 per share, plus accumulated dividends, and we need not repeat such contention here.

## POINT II.

**Under the circumstances existing in the middle of 1945 Bond and Share would probably have made a distribution of capital of $100 per share in retirement of its preferred stocks even if Section 11 of the Act had not compelled such retirement.**

In July, 1945 when Bond and Share filed its compliance plans, the company was impelled by economic pressure under then existing conditions, concededly brought about to a large extent by the impact of the Act during the earlier years, to retire its preferred stocks by making a distribution of capital of $100 per share to the holders of such stocks (R. 379-80), together with a related capital distribution to its common stockholders represented by the offer to them at a discount in price of Bond and Share's

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* At pages 13-18.

holdings in American Gas and Pennsylvania Power & Light Company (Pennsylvania) (R. 46, 299).

The District Court did not deal with this point, having decided the charter question as a matter of interpretation of the provisions of the charter as explained hereafter under Point III. The Commission, however, found that Section 11 called for the elimination of the Bond and Share preferred stocks, and that a substantial portion of the funds used in the retirement of such stocks emanated from a series of events impelled by Section 11, and, consequently, that the question of whether business judgment would have dictated elimination of the preferred stocks ceased to be relevant (R. 54).

We agree with the Commission that the evidence in this case is clear that Bond and Share would not have taken any steps to liquidate, either in whole or in part, and would not have made any distribution of capital to its preferred stockholders as a matter of business judgment if the Act had never affected the affairs of Bond and Share and its subsidiary companies in any way. We contend, however, that since the impact of the Act, plus economic developments, placed Bond and Share in such a situation in the middle of 1945 that it would have been impelled as a matter of business judgment to effect a distribution of capital to its preferred stockholders of $100 per share, as well as to carry out a capital distribution to its common stockholders as stated above, and since Bond and Share could have effected such distributions of capital without the aid of Section 11 of the Act, the preferred stockholders' claims cannot exceed $100 per share, plus accumulated dividends, under the Bond and Share charter provisions.*

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* We need not repeat our discussion of the *El Paso* case hereinabove at pages 18-19.

## POINT III.

**Bond and Share could have effected a distribution of capital of $100 per share, plus accumulated dividends, to its preferred stockholders apart from the Act.**

The Bond and Share charter provides in Section 3(b) that "in the event of any liquidation, dissolution or winding up of the affairs of the Corporation or any distribution of its capital, whether voluntary or involuntary," each holder of the $6 and $5 preferred stocks of Bond and Share "shall be entitled *pari passu* to be paid on each share of such stock held by him the sum of $100", plus the amount of accumulated dividends, and no more (R. 399-400).

Bond and Share's plans for compliance with the Act involve a substantial liquidation of Bond and Share, as shown by Chart I (Appendix hereto). It is not necessary to determine whether the liquidation is complete or partial, since it obviously involved distributions of capital by Bond and Share. In connection with the retirement of the preferred stocks, capital was distributed in the aggregate of $100 per share. In order to obtain the major portion of the funds with which to retire the preferred stocks, Bond and Share offered substantially all of its holdings of two subsidiary companies (American Gas and Pennsylvania) to its stockholders at prices several dollars below the market prices for the American Gas and Pennsylvania securities (R. 200-1). This represented a distribution of capital to the common stockholders to the extent of the value of the rights to purchase the American Gas and Pennsylvania securities which were given to them (R. 299-300).

The phrase "any distribution of its capital" appearing in Section 3(b) of the Bond and Share charter was patently

meant to refer to a transaction other than "any liquidation, dissolution or winding up of the affairs of the Corporation". Otherwise the former phrase would be wholly superfluous and repetitious. It is significant that the Commission in its opinions relating to Plans I, II-A and II-B referred repeatedly to Section 3(b) of Bond and Share's charter as providing for "liquidation or other distribution of capital"*.

Bond and Share could have retired its preferred stocks by making a distribution of capital of $100 per share without using the mechanism of Section 11(e) of the Act.** Just prior to the retirement of the preferred stocks, the common stockholders held over 83% of the total voting power of the preferred and common stockholders. Mr. George G. Walker, President of Bond and Share, testified that in his opinion it would have been possible to obtain a vote of more than 66⅔% of the stock of the Company in favor of making a capital distribution aggregating $100 per share, in retirement of the preferred stocks (R. 380-2).

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* *Electric Bond and Share Co.*, SEC , H. C. A. R. 6121 (Oct., 1945) pp. 2, 9 and H. C. A. R. 6879-1 (Sept., 1946) pp. 6-9, 12; R. 42. Also in *Western Public Service Co.*, 12 SEC 804, 818 H. C. A. R. 4114, (Feb., 1943), Commissioner Healy stated in his concurring opinion:

> "The charter provides that in the case of any liquidation or dissolution or reduction of capital resulting in a distribution of assets, the preferred stockholders are to receive $100 plus accrued dividends * * *. Thus, it seems clear that the intent was that if the enterprise, or any substantial part of it, was abandoned, the capital involved and thereby released, should be returned to those who contributed to it or to those who had succeeded to their rights * * *. Certainly the reduction provision in the charter was pointed to something less than total dissolution or liquidation."

See also *Levin* v. *Pittsburgh United Corp.*, 330 Pa. 457, 470-1, 199 Atl. 332, (1938).

** In this discussion we are considering the distribution of capital involved as being accomplished by one payment of $100 per share since that was the substance of Bond and Share's program of retirement of the preferred stocks.

With such a stockholders' vote a distribution of capital of $100 per share in retirement of the preferred stocks could have been effectuated under the corporation laws of New York in the circumstances of the present case.* Such distribution could have been consummated under Section 36** (providing for the elimination of authorized

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* The section numbers hereinafter referred to in respect of the New York Stock Corporation Law are those in effect in 1945, the time as of which it is appropriate to determine whether Bond and Share could have retired its preferred stocks by a distribution of capital under Section 3(b) of its Charter and the applicable provisions of state law. The numbering and to some extent the form of Sections 36-8 of the New York Stock Corporation Law were changed by amendments effective as of September 1, 1949, the provisions of former Sections 36-8 referred to herein now appearing in Sections 35-8. Such amendments were not effective until more than four years after the filing of Bond and Share's Plans for the retirement of its preferred stocks and in any event would not affect the substance of the arguments made.

** The procedure under Section 36 would be to eliminate the preferred stocks under Section 36(C) (which provides for the elimination of any previously authorized shares) and at the same time reduce Bond and Share's capital under Section 36(G) (which provides for the reduction of capital to a specified amount in connection with any elimination of shares) by the amount of $100 for each share of outstanding stock eliminated, returning the amount of such reduction in capital to the preferred stockholders in accordance with their rights under Section 3(b) of the charter. The required authorization for such a procedure under subsections (C) and (G) of Section 36 is a majority vote of the outstanding shares entitled to vote (Section 37, 3(a)).

We do not believe that the proposed procedure would be a "classification or reclassification" of the preferred shares under Section 36(E), thereby necessitating the approval under Section 37, 3(c), of two-thirds of the preferred stocks (voting as a class) on the ground that such stocks were being "adversely affected" by such classification or reclassification. It must be noted that Section 36(E) restricts a "classification or reclassification" to a transaction to be effected "under this paragraph (E) or paragraph (D) or by a reduction in the par value of such shares under paragraph (B)". It has been seen that the proposed procedure would not be effected under any of such subparagraphs of Section 36. Moreover, even aside from the restrictive clause just quoted, we do not believe that the proposed procedure would involve a "classification or reclassification" which would cause the preferred stocks to be "adversely

shares and the reduction of capital in connection therewith) or Section 105* (providing for dissolution of corporations without judicial proceedings) of the New York Stock Corporation Law.

The District Court held that Bond and Share could not retire its preferred stocks by a distribution of capital under Section 3(b) of its charter, since proper interpretation of the charter provisions would lead to the conclusion that the only method of retiring preferred stocks apart from the Act was pursuant to the redemption provisions found in Section 3(e) of the charter. The Court felt that Section 3(b) contemplated a situation in which there was at least "some payment or distribution to the common", and that adoption of our interpretation of Section 3(b) would render Section 3(e) meaningless.

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affected" by such procedure since the retirement of the preferred stocks would here take place pursuant to a charter provision specifically providing therefor.

* The procedure here would be that Bond and Share would file the requisite certificate of dissolution with the approval of the holders of two-thirds of its outstanding shares of stock entitled to vote, the directors then proceeding under subsection 9 of Section 105, after paying or providing for all corporate obligations, to sell to another corporation formed for the purpose all the corporate assets over and above a sum sufficient to provide each preferred stockholder with $100 per share, plus accumulated dividends, in exchange for all the captial stock of the new corporation. This sale would require the approval of only a majority of the outstanding shares entitled to vote. Thereafter Bond and Share would distribute the cash to its preferred stockholders and the capital stock of the new corporation to the common stockholders, both as distributions under Section 3(b) of the Bond and Share charter. Similar procedure might be followed under Sections 20 and 22 of the New York Stock Corporation Law.

It may be that if a distribution of capital were made to the preferred stockholders under Section 105 of the New York Stock Corporation Law, any dissenting preferred stockholder would have the right of appraisal under that section. In any event it is clear from a review of the applicable authorities relative to appraisal under New York State law that any dissenting stockholder could not have expected his stock to be appraised at an amount greater than his charter "liquidation" claim ($100 per share, plus accumulated dividends).

We believe that the Court misinterpreted Section 3(b) of the charter. As we have stated, a distribution of capital was made to the common stockholders in connection with the retirement of the preferred stocks. This capital distribution was substantial in amount, aggregating in the neighborhood of $9,000,000 (R. 201, 299-300; Transcript, unprinted, p. 592). Moreover, Sections 3(b) and 3(e) of the charter were not meant to be mutually destructive, but to be complementary. The redemption provision, Section 3(e), was meant to apply primarily if Bond and Share desired to refinance its preferred stocks at a lower cost to the company but to continue the capital represented by such stocks, i. e., where there was no shrinkage in capital employed in the business. The distribution of capital provision, Section 3(b), was meant to apply precisely to the type of situation in which Bond and Share found itself in 1945, i. e., where its enterprise was being contracted in size and substantially liquidated so that the company could no longer use its entire invested capital and, therefore, proposed to return to the preferred stockholders the capital which they had originally invested in the enterprise.

Counsel for the Commission has specifically recognized this very distinction in a brief to the Court of Appeals for the Third Circuit in the *Pennsylvania Edison* case.* There Commission counsel stated that a charter "distribution of capital" provision contemplates "at least prima facie a situation in which the invested interest of the common stockholder would be substantially curtailed, if not terminated", and that such a situation exists "when there is no longer need to use the entire invested capital in the business, and a distribution of capital can be made." The brief

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* *Pennsylvania Edison Co.*, SEC , H. C. A. R. 8550 (Oct., 1948), aff'd 176 F. (2d) 764 (C. A. 3, 1949).

also stated that the phrase "distribution of capital" did not apply "where there is no shrinkage of capital employed in the business and what is paid out to the preferred is merely the proceeds of a new issue of securities sold for refunding purposes" since "to so hold would make the provision for a higher redemption price completely nugatory".* We are wholly in accord with the statements just quoted and submit that they are equally applicable here.

This Court held in the *Continental* case** that upon a distribution of capital the common law rule was that both common and preferred stockholders shared alike in the assets. If the Bond and Share preferred stockholders were in any danger of running afoul of the common law rule, they would be the first to claim the benefit of Section 3(b) of the charter upon a distribution of capital so that they would rank ahead of the common stockholders to the extent of $100 per share, plus accumulated dividends.*** The preferred stockholders should hardly expect the terms of Section 3(b) to work only in their favor.

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* The relevant portion of the brief of Commission counsel in the *Pennsylvania Edison* case is reproduced in detail in the Appendix hereto, pp. A-2, 3.

** *Continental Insurance Co.* v. *United States,* 259 U. S. 156 (1922).

*** Before the District Court our opponents cited *Colorado* v. *Great Western Sugar Co.*, 29 F. (2d) 810 (C. A. 8, 1928), in support of their contention that the phrase "any distribution of its capital" in Bond and Share's charter means no more and no less than total liquidation. That case is clearly distinguishable. Not only is the charter in that case different from the Bond and Share charter, but also the *Great Western* case did not involve any substantial contraction of assets as does the present case.

## POINT IV.

**The Commission, as affirmed by the District Court, improperly and inconsistently gave effect to the impact of the Act in making its investment value appraisal of the preferred stocks.**

Bond and Share's principal assets at the time of the retirement of its preferred stocks consisted of its junior equity holdings in its five subholding companies. Consequently, the preferred stocks were junior not only to the senior securities of the subholding companies but also to all securities of the underlying operating companies. Moreover, all income from Bond and Share's junior equity holdings in the case of three of the subholding companies, i.e., Foreign Power, American and Electric, was barred by more than $200,000,000 of preferred stock dividend arrearages (R. 84, 98, 125).

As long as the quantity and quality of the earnings available to service the preferred stocks were affected by that situation, not even the witnesses for the preferred stockholders claimed that the investment value of the preferred stocks exceeded $100 a share. The problem was avoided by the Commission's assumption that reorganizations of Foreign Power, Electric and American (one of which has not yet been consummated and the other two of which were consummated only in 1949 and 1950, respectively) had been carried out by early 1947 pursuant to the Act (R. 69-71). This assumption had the effect of both eliminating Electric and American, as well as all their intervening securities, and also of wiping out the tremendous dividend arrearages on the preferred stocks of Foreign Power, American and Electric. If the Act had not been considered to apply, the evidence was clear that the three sub-

holding companies would not have been reorganized so as to dissolve these companies or to retire the substantial senior securities ahead of Bond and Share's junior holdings (R. 368-9).*

This Court in the *Engineers* case held that the Commission should determine the investment value of securities without reference to the "present liquidation or reorganization required by the Act."** The "present liquidation or reorganization" in the instant case is the substantial liquidation of the whole Bond and Share system (including the reorganizations of Foreign Power, American and Electric) pursuant to the Commission's mandatory orders in the consolidated proceedings involving the Bond and Share system. To give effect to the reorganizations of the three subholding companies, as the Commission did, was to violate the *Engineers* case rule and thereby to improve the character of the Bond and Share preferred stocks to the point where they no longer resembled the preferred stocks as they actually existed at the time of their retirement.

But if the Commission were right in giving effect to the impact of the Act in order to lay some basis for the assumption that Foreign Power, American and Electric had been reorganized as per the Commission's hypothesis, it could not then properly do an "about face" and incon-

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* Charts II and III included in the Appendix hereto illustrate the structures through which income from Bond and Share's junior equity holdings in American and Electric would have to flow before becoming available to Bond and Share for payment of dividends on its preferred stocks. Chart II shows such structures on the assumption that American and Electric (a) were not reorganized in any manner and (b) were reorganized without the aid of the Act (Transcript, unprinted, 3019-20). Chart III shows that such structures are substantially simplified and reduced in number on the assumption that American and Electric were reorganized pursuant to the Act on the hypothesis adopted by the Commission.

** *SEC* v. *Central-Illinois Corp.*, 338 U. S., 96, 140 (1949).

sistently refuse to recognize that the impact of the Act required Bond and Share to divest itself of a substantial portion of the securities (and, therefore, of the earnings from such securities) it would receive as a result of the three subholding company reorganizations. That, however, is what the Commission did and such action was affirmed by the District Court.

## POINT V.

**The Commission, as affirmed by the District Court, erred as a matter of law in basing its investment value appraisal on stock yield levels prevailing between November 1945 and March 1947, a period of abnormally high market values of a transient nature.**

The Commission stated that its finding to the effect that the value of the $6 preferred stock equalled at least $110 per share was made "* * * in the light of the yield levels current during the period [between November 1945 and March 1947] that the preferred stocks were being severed from the enterprise * * *" (R. 80). This Court in the *Engineers* case stated that "the Commission would be wrong in selecting, as a basis for valuation, abnormal or highly speculative market values of a transient nature."*

The period between November 1945 and March 1947 represented just such a transient period of abnormally high market values for preferred stocks. This fact cannot be disputed and is clearly illustrated by one of the exhibits offered in evidence on behalf of the preferred stockholders.

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* *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 146 (1949).

The exhibit, as brought down to date, appears in the Appendix attached hereto and is marked as Chart IV.*

Chart IV shows that in the twenty year period from the end of 1929 to the end of 1949, the all-time high peak of market prices of "all preferred stocks on the New York Stock Exchange" was reached between November 1945 and March 1947. During this period preferred stock prices were 44% higher than the average price for the period 1939-1949 and substantially higher than in the periods immediately preceding and following.

There were definite indications in the year 1946 and early in 1947, before the completion of the preferred stock retirement was effected (Bond and Share Ex. 146; R. 408), that preferred stock yields were sharply rising and preferred stock market prices were correspondingly sharply falling. The Commission wholly disregarded this evidence of prospective events which would have reduced the value of the Bond and Share preferred stocks, although, as we have stated above, it gave full effect to assumed future reorganizations of Bond and Share's three subholding companies, as prospective events which substantially increased the value of the preferred stocks.

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Without arguing the point we would like to state our contention at this time, in order to reserve our right to

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* Chart IV is a reproduction of Jackson Ex. 8d with the curves representing the average price of all preferred stocks listed on the New York Stock Exchange and representing Electric Bond and Share common stock extended up to the end of 1949, the limit of the chart. A box enclosing the period November 1945 to March 1947, together with an accompanying statement, has been added to the exhibit. In computing the 44% average figure shown on the chart, average monthly prices were used for the period November 1945 to March 1947. For the entire period 1929-1949 an average price of the figures employed in plotting Jackson Ex. 8d was used.

request this Court to hear argument on the point later if the present petition is granted, that the findings of the Commission respecting the investment value of the $6 preferred stock are not supported by substantial evidence on consideration of the record as a whole in the light of this Court's recent opinion in *Universal Camera Corp.* v. *National Labor Relations Board,* unreported, Case No. 40, October 1950 Term, decided February 26, 1951.

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## POINT VI.

**The Commission, as affirmed by the District Court, erred as a matter of law in directing that Bond and Share must pay interest with respect to the $6 preferred stock at the annual rate of 5.45% from March 6, 1947 to date of payment.**

### A.

Assuming *arguendo* that all our contentions in the previous points are incorrect, we submit that the Commission and the District Court erred in directing the payment of interest.

Interest at 5.45% per annum on the $8,400,000 which Bond and Share has been directed to pay with respect to the $6 preferred stock amounts to over $450,000 per year and has aggregated for the period from March 6, 1947 to March 31, 1951 more than $1,850,000.

The retirement of the preferred stocks having been completed in March 1947, Bond and Share filed its Plan II-B in April of that year and the case was presented to the Commission for decision in April of 1948. The Commission held the case under advisement until June 1950. During this period of approximately 2¼ years Bond and Share was

in no position to tender payment of any amount since there was no determination as to whether it owed anything to the preferred stockholders and if so, how much. Moreover, Bond and Share, during this period, was obliged to keep approximately $10,000,000 in liquid form so as to be in a position to meet any necessary payment with respect to the preferred stocks. The Company, therefore, did not have the use of the money during this period.

This Court has repeatedly announced that interest is given or withheld by the Courts in response to considerations of fairness.* It has also been established by this Court that interest should not commence to run until the principal amount involved in litigation is liquidated.**

In the light of the foregoing it would be grossly inequitable to require Bond and Share to pay any interest and we submit that the decisions of this Court just cited support such position.

**B.**

If any interest is legally payable, the interest rate should be substantially reduced below 5.45%. It may fairly be said that no substantial portion of the delay since March 1947 has been attributable to the common stockholders of Bond and Share. There is no equity, therefore, in obliging the common stockholders to bear the whole brunt of the delay by reimbursing the preferred stockholders at the unusually high rate of 5.45% for a period which already has extended to almost four years.

We have shown that Bond and Share has not been in a position, since its debt was not liquidated until entry of

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* *Board of County Commissioners* v. *United States*, 308 U. S. 343, 352 (1939); *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 165 (1946).

** *Mowry* v. *Whitney*, 81 U. S. 620, 653 (1871); *Duplate Corp.* v. *Triplex Co.*, 298 U. S. 448, 459 (1936); *Matter of Erlanger*, 237 N. Y. 159, 166, 142 N. E. 571 (1923).

the District Court order of March 2, 1951, to make tender of payment. Nor, for the reasons above stated, has Bond and Share had the use of the funds it has been obliged to hold in liquid form for the past several years.

Finally, after the contingent certificates were issued under Plan II-A to the preferred stockholders in March 1947, such holders no longer owned securities subject to the risk factors appurtenant to the formerly outstanding $6 preferred stock. Consequently, they were not entitled to interest at a yield rate which reflected such risk factors. The contingent certificates are in effect evidences of short-term contingent claims for cash against Bond and Share. Such claims with respect to the $6 preferred stock are subject to a maximum limit of approximately $8,400,000, being $10 per share (the redemption price ceiling) on 840,268 shares.

The risk factor on these contingent certificates is negligible. Indeed, if the asset value figures mentioned by the Commission in its findings in the instant case be taken as correct, the maximum claim of the certificates with respect to the $6 preferred stock would be covered approximately 25 to 45 times by such assets (R. 66-7). There is no argument of fairness that justifies paying to the holders of these "gilt-edged" certificates, free from any risk factor, interest computed upon yield rates applicable to preferred stock of the speculative investment caliber of Bond and Share's $6 preferred stock.

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No question was raised before this Court in the *Engineers* case by the company or any common stockholder with respect to the fairness to the *common* stockholders of the payment of interest. This Court had before it for decision only the question of whether the interest allowed by the

Commission was sufficient in amount to be fair to the *preferred* stockholders, who attempted to claim substantial additional interest—even to the extent of seeking interest on the amount which had already been paid to them.*

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WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit and that a hearing upon and determination by this Court of the matters hereby presented be had.

Dated, April 25, 1951.

Respectfully submitted,

JOHN F. MACLANE,
Counsel for Petitioner.

SIMPSON THACHER & BARTLETT,
Of Counsel.

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* It should be added that in the *Engineers* case the amount to be placed in an escrow fund, which included a sum sufficient to cover the payment of interest on the $6 preferred stock at a 5.45% annual rate, had been determined early in the proceedings and that no objection was raised by anyone to such amount included for interest, as appears from the Commission's opinion (*Engineers Public Service Co.,* SEC , H. C. A. R. 7041 (Dec., 1946), p. 36).

# APPENDIX.

## Section 11(e).

Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. 79k(e)] reads as follows:

> "Sec. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may so constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

**Excerpt from brief submitted on behalf of Securities and Exchange Commission to United States Court of Appeals for the Third Circuit in *Pennsylvania Edison Company* case (H. C. A. R. 8550, aff'd 176 F. (2d) 764, C. A. 3, 1949).**

In the *Pennsylvania Edison* case counsel for the Commission argued that the liquidation provision in the Pennsylvania Edison charter should not apply to a merger between Pennsylvania Edison and one of its associated companies and thus limit the amount of cash to be received by holders of preferred stock of Pennsylvania Edison upon the retirement of such stock in connection with the merger, which was carried out as a part of a Section 11(e) plan. In drawing a distinction between the redemption price and the lower liquidation price provided in the Pennsylvania Edison charter, Commission counsel stated in the Commission brief (dated May 1949, in Case No. 9859 at pp. 31-3) as follows:

> "* * * Although the lower liquidation price was intended to apply whether the 'liquidation' might be voluntary or involuntary, it obviously was not intended that voluntary liquidation, determinable by vote of the common stockholder alone, should serve as a cheaper alternative to redemption as a means of terminating the preferred stockholders' interest in the company while the common stockholder retains an undiminished interest. This is further illustrated by the detailed specification, in Section 3 of the by-laws, as to the kind of liquidation contemplated. The specified contingencies are (1) 'any liquidation or dissolution or winding up of the corporation,' (2) 'a sale of all or substantially all of the assets,' (3) 'any distribution of its capital.' Each of these contingencies contemplates at least prima facie a situation in which the investment interest of the common stockholder would be substantially curtailed, if not terminated (footnote omitted). That is what occurs when the business conducted by the company is wound up; when there is a sale in the usual arms-length sense to outside interests; or when there is

no longer need to use the entire invested capital in the business, and a distribution of capital can be made.*

• • • • • •

* "When preferred stock is retired there is, of course, a distribution of capital to the preferred. But obviously that is not what is meant by the by-law in question as applied to situations where there is no shrinkage in capital employed in the business and what is paid out to the preferred is merely the proceeds of a new issue of securities sold for refunding purposes. To so hold would make the provision for a higher redemption price completely nugatory."

# STRUCTURES THROUGH WHICH INCOME OF AMERICAN AND ELECTRIC GROUPS MUST FLOW BEFORE BECOMING AVAILABLE FOR PAYMENT OF DIVIDENDS ON BOND AND SHARE PREFERRED STOCKS

ACTUAL AS OF DATE OF RETIREMENT AND
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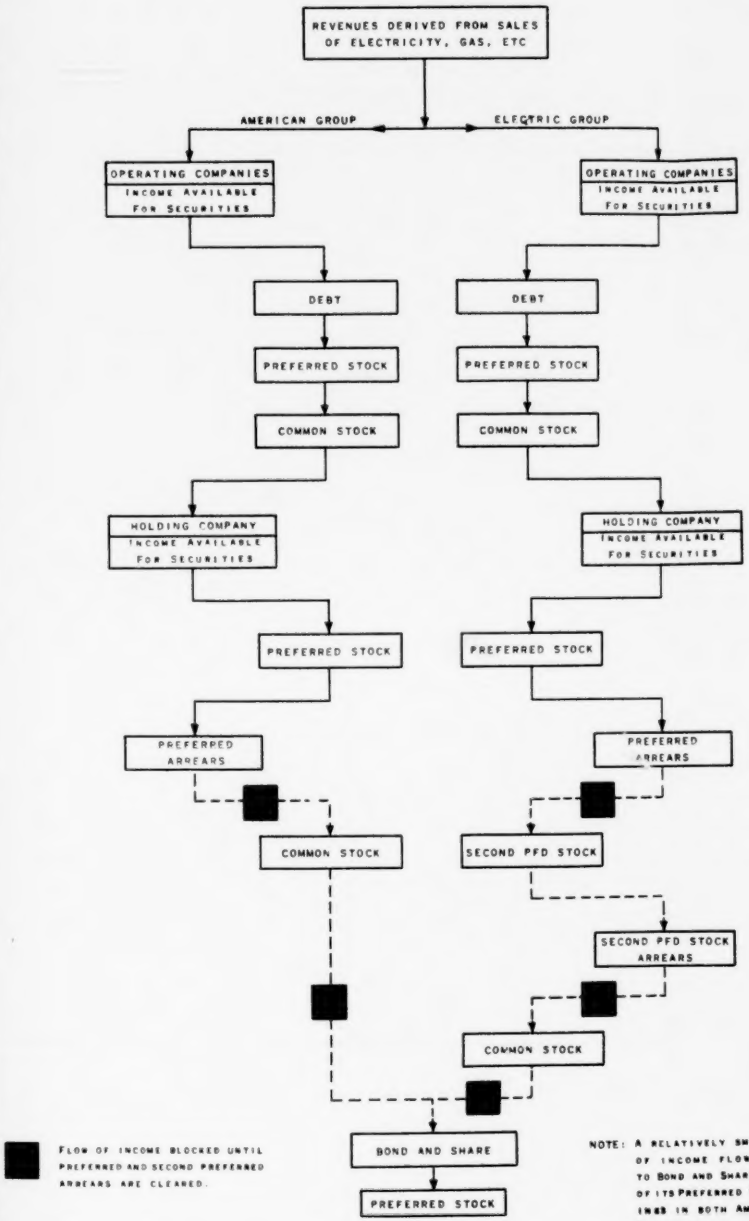
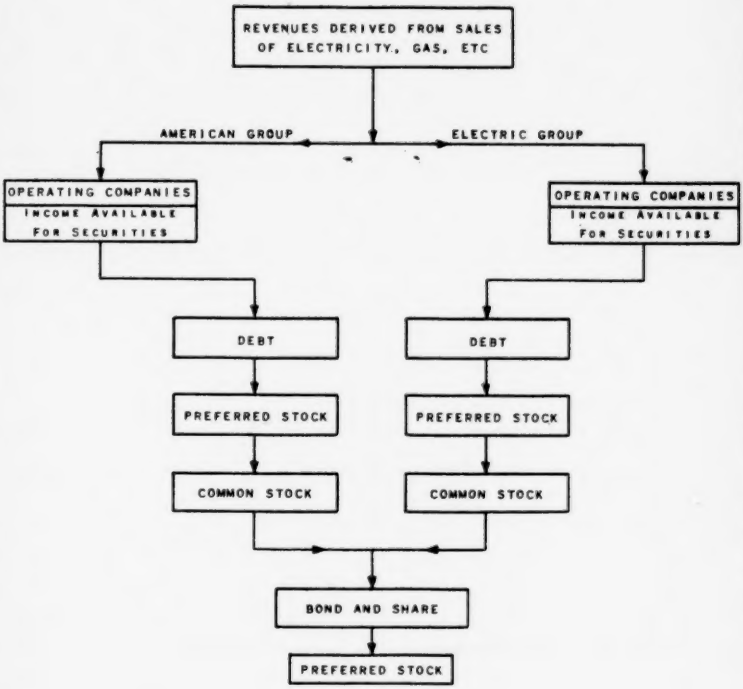



NOTE: A RELATIVELY SMALL AMOUNT OF INCOME FLOWS THROUGH TO BOND AND SHARE BY REASON OF ITS PREFERRED STOCK HOLDINGS IN BOTH AMERICAN AND ELECTRIC.

CHART I

STRUCTURES THROUGH WHICH INCOME OF AMERICAN AND ELECTRIC GROUPS MUST FLOW BEFORE BECOMING AVAILABLE FOR PAYMENT OF DIVIDENDS ON BOND AND SHARE PREFERRED STOCKS

AS REORGANIZED BY GRAHAM AND ACCEPTED BY SEC



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# In the Supreme Court of the United States

OCTOBER TERM, 1950

---

No. 700

ELECTRIC BOND AND SHARE COMPANY, PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD, *et al.*, ALFRED B. CORNELL, *et al.*, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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### OPINION BELOW

Since the petition for a writ of certiorari was filed immediately after the record was brought from the District Court to the Court of Appeals and before the Court of Appeals had an opportun-

ity to consider the issues or to render judgment, there is no opinion of the Court of Appeals. The opinion of the District Court is reported at 95 F. Supp. 492 (R. 4). The findings and opinion of the Commission dated July 28, 1950, have not been officially reported but are set forth in Holding Company Act Release No. 9980 (R. 36).

### JURISDICTION

The order of the District Court, a part of which is sought to be reviewed, was entered on March 2, 1951 (R. 16). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. Section 79y.

### STATUTE INVOLVED

The pertinent sections of the statute involved, 11(b)(2), and 11(e) of the Public Utility Holding Company Act, are set forth in an Appendix, *infra,* pp. 17-19.

### QUESTIONS PRESENTED

1. Whether, in measuring the rights of the $6 preferred stockholders pursuant to plans calling for the retirement of their stock under Section 11(e) of the Public Utility Holding Company Act, the Commission erred in holding that such stockholders were entitled to receive sums equivalent to their investment value on a going concern basis rather than a sum specified in the corporate charter to be payable upon "liquidation, dissolution or

winding up of the affairs of the corporation or any distribution of its capital, whether voluntary or involuntary."

2. Whether the District Court erred in holding that there was substantial evidence to support the Commission's appraisal of the investment value of the $6 preferred stock.

3. Whether it was in accordance with the "fair and equitable" standard of Section 11(e) of the Public Utility Holding Company Act to award preferred stockholders, deprived of $10 during the pendency of the litigation, compensation computed at a rate measured by the yield they had been receiving upon the investment value of their stock.

STATEMENT

Petitioner seeks a writ of certiorari to review a portion of an order of the United States District Court for the Southern District of New York enforcing a plan filed with the Securities and Exchange Commission pursuant to Section 11(e) of the Public Utility Holding Company Act. The plan, designated as Plan II-B, was the third in a series of plans concerned with retiring the two series of preferred stock of Electric Bond and Share Company (Bond and Share), and satisfying the rights and claims of the holders thereof.

Bond and Share, a registered holding company, is a New York corporation. It was the apex of a pyramid of holding companies and operating companies forming, at one time, the largest public

utility holding company system in the world. Bond and Share owned debt or stock securities, or both, of five subsidiary holding companies: American & Foreign Power Company (Foreign Power), American Gas and Electric Company (American Gas), American Power & Light Company (American), Electric Power & Light Corporation (Electric), and National Power & Light Company (National). In addition, it owned directly interests in various operating companies in the system.[1]

Early in 1940 the Commission instituted the first of a number of Section 11 proceedings directed to Bond and Share and its subsidiaries in the course of which it soon became apparent that the Bond and Share System would have to be sharply contracted if it was to meet the requirements of that section. The Commission, *inter alia,* entered orders directing the liquidation of Bond and Share's intermediate holding companies, American and Electric, which were upheld by this Court in *American Power & Light Company* v. *Securities and Exchange Commission,* 329 U.S. 90. The process of divestment, undertaken by Bond and Share in order to comply with the act, resulted in accumulating large amounts of cash, part of which was used, pursuant to Commission approval,

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[1] See Table II (R. 65) in the Commission's opinion for a list of these companies and the book value of the Bond and Share holdings as of December 31, 1946.

to purchase on the open market and retire some of the preferred stock of Bond and Share (R. 40-41).

On July 25, 1945, Bond and Share filed three plans, designated as Plans I, II, and III, under Section 11(e) of the Public Utility Holding Company Act in an effort to bring the capital structure of the company into compliance with the Act. At that time Bond and Share had no debt outstanding but had 840,268 shares of preferred stock entitled to $6 per share cumulative dividends annually, 203,012 shares of preferred stock entitled to $5 per share cumulative dividends annually, and 5,250,-357.66 shares of $5 par value common stock (R. 42). Except for a $1 difference in dividend preference the $6 and $5 Preferred Stocks have identical rights. Each had a preference of $100 a share upon liquidation or other distribution of capital and was callable at the option of the company at any time at the redemption price of $110 per share plus accrued dividends (R. 399, 400).

Plan I provided that, as an initial step in the retirement of these issues, Bond and Share would make a pro rata payment of $30 per share to all preferred stockholders and that their rights to dividends and capital would be modified to reflect this payment. In approving this plan the Commission found the elimination of the preferred stocks from the Bond and Share capital structure necessary to effectuate the provisions of Sections 11(b), and the United States District Court for the South-

ern District of New York approved and enforced this determination.[2] No appeal was taken.

Plan II-A (which replaced the earlier Plan II) provided for the payment to both the $5 and $6 preferred stocks of $70 per share plus accumulated dividends, in cash, and the issuance of a certificate entitling the holder to such additional amount, if any, as might be ultimately awarded by the Commission or the courts. This plan was approved by the Commission and enforced by order of the United States District Court for the Southern District of New York on December 20, 1946 (R. 258).[3]

Plan III, which provides for certain other dispositions by Bond and Share, is not relevant to these proceedings.

On April 7, 1947, Bond and Share filed its Plan II-B. Initially, this plan provided that no further payments be made to the preferred stockholders. While the proceedings were pending before the Commission the case of *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 was argued before this Court. Since that case appeared to involve comparable issues no determination was made by the Commission pending its decision. The *Central-Illinois* opinion was issued on June 27, 1949, and Bond and Share immediately requested

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[2] *In re Electric Bond and Share Co.*, Civil Action No. 33-343 (S. D. N. Y. Nov. 5, 1945).

[3] *In re Electric Bond and Share Co.*, 73 F. Supp. 426 (S. D. N. Y. 1946).

leave to file with the Commission supplemental briefs and present another oral argument in the light of that opinion. Leave was granted, briefs were filed and another argument was heard.

On July 19, 1950 the Commission issued its order approving that portion of Plan II-B which provided for no further payment to the $5 preferred stock but disapproving that portion of the plan limiting the $6 preferred stock to the $100 payment already received. The Commission determined that each $6 preferred share should be paid an additional $10, together with compensation for the delay in payment at the rate of 5.45 per cent per annum. The rate (5.45%) was computed, in accordance with the *Central-Illinois* formula, by the relationship between $6, the annual dividend, and $110, the investment value.

In its opinion the Commission reviewed the voluminous evidence of the investment value of the preferred stock presented by the interested parties, and on the basis of the whole record decided that the $6 preferred stock had an investment value of at least $110. The Commission found it unnecessary to determine more precisely what the investment value was in view of the provision in the charter which would have permitted Bond and Share to redeem these shares for that sum. Bond and Share thereupon filed amendments to its Plan II-B to conform it to the directions of the Com-

mission but reserved the right to object to these amendments before the courts.

The Commission then applied to the District Court for an order approving the amended plan and enforcing its provisions. Over the objections of Bond and Share, representatives of certain $5 preferred shareholders, and a common stockholder, the District Court granted the Commission's request.

Cross-appeals have been filed by Bond and Share and the $5 preferred stockholders.

## ARGUMENT

1. Petitioner urges that this Court consider, prior to decision by the Court of Appeals, the issues raised by its appeal from the order of the district court, arguing that the primary issue is substantially the same as the primary issue presented in *Federal Liquidating Corp.* v. *S. E. C.* and *Edelstein, et al.* v. *S. E. C.*, Nos. 686 and 687, this Term. We agree that there is a close relationship between the primary legal issues in the two cases. We are filing a separate brief in opposition to the petitions in Nos. 686 and 687, in which we state our reasons for believing that there is no novelty in the issues and that the court below correctly determined that investment value, rather than the charter liquidation preference, is the proper measure of the preferred stockholders' rights in a plan of liquidation in compliance with Section 11 of the Holding

Company Act. This Court is respectfully referred to that brief for a more complete analysis of the issue involved.

The Commission's order in this case is based on the same principle as that upheld in the *Central-Illinois* case, as well as in the earlier decision in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, namely, that the proper measure of preferred stockholders' rights in a solvent company, when compelled to surrender their investment under a Section 11 (e) plan, is the investment value of their stock on a going concern basis rather than its charter liquidation preference.

The charter provision relied upon by petitioner in this case is Section 3 (b) which provides:

> In the event of any liquidation, dissolution or winding up of the affairs of the corporation or any distribution of its capital, whether voluntary or involuntary * * * each holder of the $6 preferred stock * * * shall be entitled * * * to be paid on each share of such stock held by him the sum of $100 * * *. After such payment * * * the remaining assets and funds of the corporation * * * shall be divided and distributed among the holders of the Common Stock. [R. 399-400.]

Bond and Share does not dispute that Section 11 (b) of the Holding Company Act compelled the retirement of its preferred stock, and indeed it specifically invoked the powers of the Commission and the district court under Section 11 (e) to effect

piecemeal retirement of its preferred stock in a manner not authorized by the charter. It urges, however, that apart from the compulsions of the Act it would have been prompted by business reasons to retire its preferred stock and could have done so under its charter by a payment of only $100 per share. In the Commission's view, even assuming the facts, this would be immaterial to the question of whether "investment value" or the charter provisions are controlling under Section 11 (e) of the Act. However, the alleged probability of the retirement of the preferred stock, not under compulsion of the Act and for independent business reasons, was considered by the Commission as one factor affecting the investment value of the preferred stock. The Commission therefore considered the evidence offered and rejected the factual basis for the contention that business reasons unrelated to the compulsions of Section 11 would have led Bond and Share to retire, without refunding, its preferred stocks (R. 54). The District Court held that this finding was based on substantial evidence (R. 15). As to this point the decision rests upon considerations generally similar to those involved in the *Federal* case, although of course upon different evidence.

The district court rejected Bond and Share's interpretation of what the charter provision in question would require if the petitioner had sought to retire its preferred stock pursuant to its charter. The District Judge held that "even if Bond and

Share had, as a matter of business judgment apart from the Act, sought to retire the preferred, it could not have done so under § 3 (b) but would have had to do so under § 3 (e)" (R. 9), the provision of the charter permitting retirement of the preferred by redemption at $110 per share (R. 400-402).

Thus, the question involved in the *Federal* case, whether the charter liquidation provision is controlling, is not reached unless this Court disagrees with the decision of the District Judge as to what the charter would have permitted in the absence of the Holding Company Act.[4]

2. A further difficulty is presented by the suggestion that this Court grant certiorari at this stage in the case, since petitioner here is only one of the appellants in the court below and the other appellant has raised issues which would not necessarily be determined by a decision on the issues here involved.

An appeal is pending in the Court of Appeals for the Second Circuit on behalf of Bond and Share's $5 preferred stock, which was found by the Commission and the district court to have an in-

[4] In addition, the decision of Judge Leibell in approving Plan II-A seems to foreclose any such argument as Bond and Share makes with respect to the controlling weight which should be assigned to its charter liquidation provision. Judge Leibell expressly held, and it must be taken as the law of the case, that the preferred stock was being retired: "* * * not in any of the ways specified in the charter, but in accordance with the plans which cut across the charter provisions." *Electric Bond and Share Co.*, 73 F. Supp. 426, 446. (R. 293)

vestment value of only $100 per share. That appellant apparently will urge that the evidence required a higher valuation for the $5 preferred. A grant of the instant petition would thus require this Court to pass upon questions of fact with respect to one class of preferred stock while similar issues not concluded by the determination of this Court with respect to the other class might remain pending in the Court of Appeals.

3. Petitioner's objection to the Commission's order awarding compensation for delay presents a minor and insubstantial issue. Having found the fair investment value of the $6 preferred stock to be $110 per share, the Commission was required, under all the cases thus far decided, to award these stockholders compensation for delay in payment at a rate "which approximates the favorable rate of return they received on their preferred stock."[5] In accordance with the formula adopted in the *Central-Illinois* case, which was approved by this Court (338 U. S. 96, 152-155), the Commission held that the rate of compensation should be $6 per annum divided by the investment value of $110 per share, or 5.45 per cent. Any lower rate would deprive the $6 preferred stockholders of the full

[5] *S. E. C. et al.* v. *Central-Illinois Securities Corporation et al.*, 338 U. S. at 145, 155. See also *In re Pennsylvania Edison Company*, 176 F. 2d 764, 769 (C. A. 3, 1949). Similar compensation for delay in payment was also awarded in the *Federal* case, and no objection was raised although the dissenting judge in the Court of Appeals in that case construed the escrow agreement there involved to require no payments in excess of the money set aside by that agreement.

return upon their investment and thus be inconsistent with the finding of fair investment value.

4. Petitioner criticizes the financial analysis from which the Commission derives its conclusions as to the investment value of the $6 preferred stock.[6] This raises merely a question of judgment as to which this Court has indicated that great weight should be given to the Commission's conclusion. See *Niagara Hudson Corp.* v. *Levintritt,* 340 U. S. 336, 346-347.

Petitioner argues that the Commission erred in taking into account prospective earnings from subsidiaries where there were dividend arrears on the preferred stocks and consequent blocks to payment on Bond and Share's holdings of common stock pending consummation of reorganizations. The Commission considered the whole record in its analysis and made detailed findings with regard to both the assets and earnings coverages of the preferred stocks. With respect to both coverages, it analyzed them on both a system and a corporate basis. With respect to system earnings, the Commission analyzed past, current, and prospective earnings coverages for the preferred stocks as of the time they were retired. The Commission did not assume that Bond and Share's subsidiaries, then in process of reorganization, had actually

[6] Petitioner's suggestion that the Commission's findings respecting the investment value of the $6 preferred stock "are not supported by substantial evidence on consideration of the record as a whole" is not developed at this time and accordingly we are not in a position to discuss it. (Pet. 32-33).

been reorganized, but did include the prospect of such reorganizations as factors to be considered in estimating prospective earnings. Consideration of such factors was necessary to reach an intelligent conclusion as to the prospective earnings that would have been available for the preferred stocks of Bond and Share if they had remained outstanding. Bond and Share's own expert testified that the use of the plans on file at the time of his testimony was "as good a way of appraising what kind of a reorganization there might have been in its overall effect, although it might have been apart from the impact of the Act, as any other way that I can think of" (R. 392-393). Accordingly, the Commission assumed, in its analysis of system earnings, that the three plans on file would be consummated in substantially the form in which they had been submitted.[7]

This analytic technique did not, as Bond and Share contends, violate any rule of the *Central-Illinois* case. The "present liquidation or reorganization required by the Act" which must be omitted from the valuation process is the elimination of Bond and Share's own corporate securities. It does not, as this Court made clear, require the reconstitution of the system as it would have existed if the Act had not been passed (338 U. S. 96, 140-143). Nor does it, we believe, require the Commis-

[7] This assumption was borne out by the two reorganizations which have been consummated thus far.

sion to ignore pending plans which may assist it in its valuation process.

Bond and Share further contends that the Commission was required to ignore these earnings because the Act compels Bond and Share to divest itself of the stock in the subsidiary holding companies. Obviously, divestment of the holdings of Bond and Share in American, Electric, and Foreign Power involves not a forfeiture of the values inherent in such holdings, but the realization of equitable equivalents. The Commission properly evaluated the holdings; Bond and Share would, in effect, almost disregard them.

Finally, Bond and Share contends that the Commission erroneously used as a basis for determining investment value "a period of abnormally high market values of a transient nature." (Pet. p. 31) A similar contention was advanced and rejected in the *Central-Illinois* case.

CONCLUSION

The decision of the District Court is correct an
no question is presented which would warrant re
view by this court. Accordingly the petition fo
certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
*Solicitor General*

JOHN F. DAVIS,
*Special Assistant to th*
*Attorney General*

ROGER S. FOSTER,
*General Counsel,*

MYRON S. ISAACS,
*Chief Counsel,*
*Division of Public Utilities.*

MYER FELDMAN,
*Attorney,*

*Securities and Exchange Commission*

MAY, 1951

APPENDIX

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, 49 Stat. 820, 15 U. S. C. 79k

Sec. 11.

* * * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such

company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equit-

able to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

**No. 700**

ELECTRIC BOND AND SHARE COMPANY,
*Petitioner,*

*v.*

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## JOINT BRIEF FOR RESPONDENTS WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, IN OPPOSITION

PERCIVAL E. JACKSON,
68 William Street,
New York 5, N. Y.

THEODORE N. TARLAU,
*Of Counsel.*

HAWKINS, DELAFIELD & WOOD,
67 Wall Street,
New York 5, N. Y.

JOHN F. B. MITCHELL, JR.,
*Of Counsel.*

DEBEVOISE, PLIMPTON & McLEAN,
20 Exchange Place,
New York 5, N. Y.,
*Of Counsel.*

PERCIVAL E. JACKSON,
*Counsel for William F. Stuberfield, et al.*

FRANKLIN S. WOOD,
*Counsel for Alfred B. Cornell, et al.*

A. FAIRFIELD DANA,
*Counsel for John Hancock Mutual Life Insurance Company.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

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**No. 700**

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ELECTRIC BOND AND SHARE COMPANY,

*Petitioner,*

*v.*

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## JOINT BRIEF FOR RESPONDENTS WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, IN OPPOSITION

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### Preliminary Statement

This brief is submitted by the respondent Stuberfield and Cornell Committees, representing holders of $6 Preferred Stock Certificates of Electric Bond and Share Company (Bond and Share), and by the respondent John Hancock Mutual Life Insurance Company, also a holder of $6 Preferred Stock Certificates, in opposition to Bond and Share's petition for a writ of certiorari.

## Opinion Below

Because Bond and Share chose to file a petition for a writ of certiorari before the Court of Appeals had an opportunity to render judgment, there is no opinion of that court. The opinion of the District Court is reported at 95 F. Supp. 492 (R. 4). The findings and opinion of the Commission, dated July 28, 1950, have not been officially reported, but are set forth in Holding Company Act Release No. 9980 (R. 36).

## Jurisdiction

The order of the District Court, a part of which is sought to be reviewed, was entered on March 2, 1951 (R. 16). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. § 79y.

## Statute Involved

The statute involved is Section 11(e) of the Public Utility Holding Company Act (the Act). The section is set forth in the Appendix hereto.

## Questions Presented

1. Whether this is an appropriate instance in which to grant certiorari prior to rendition of judgment by the Court of Appeals.

2. Whether, in measuring the rights of the $6 preferred stockholders under a Section 11(e) plan which retired their

stock, the Commission erred in holding that such stockholders were entitled to receive sums equivalent to the investment value of their stock on a going concern basis rather than the sum specified in Bond and Share's charter to be payable upon "any liquidation, dissolution or winding up of the affairs of the corporation or any distribution of its capital, whether voluntary or involuntary."

3. Whether the District Court erred in holding that there was substantial evidence to support the Commission's appraisal of the investment value of the $6 preferred stock.

4. Whether the Commission erred in awarding compensation for delay as it did.

### Statement

In the interest of brevity we avoid recital of the facts and rely therefor on the statement contained in the concurrent brief filed herein by the Commission.

## ARGUMENT

### Summary of Argument

Petitioner seeks a writ from this Court prior to rendition of judgment by the Court of Appeals. It is the position of these respondents that the petition should be denied for the following reasons:

(1) The situation here is not such as to warrant the unusual remedy of the issuance of a writ prior to judgment by the Court of Appeals. Principles of judicial economy require denial of the writ at the present time (Point I, post).

(2) The principal questions that petitioner asserts to be presented are in fact not posed by the record in this case (Point II, post).

(3) The questions actually presented in this case have recently been resolved (and contrary to the position of the petitioner) by this Court in its opinions in the *Engineers** and *Otis*** cases, and there is no conflict between Circuits (Point III, post).

## POINT I

### The writ should not be issued prior to judgment by the Court of Appeals.

Concededly, the issuance of a writ prior to judgment by the Court of Appeals is an unusual remedy seldom accorded a petitioner. As stated by Mr. Justice FRANKFURTER, concurring in part and dissenting in part in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 384 (1949):

> "The power which Congress has given to this Court to short-circuit the Courts of Appeals should not be exercised except for some compelling reason of wise judicial administration."

The "compelling reason" which petitioner asserts in the present instance is that, among the four questions it claims to be presented, one, so it asserts, is common with a question raised in *Federal Liquidating Corp.* v. *S. E. C.*,*** in which a petition for a writ is presently pending in this Court.

Although these respondents are not parties to the *Federal* case and have limited knowledge thereof, it seems clear from the opinion of Judge LEARNED HAND, writing

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* *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949).
** *Otis & Co.* v. *S.E.C.*, 323 U. S. 624 (1945).
*** *Federal Liquidating Corp.* v. *S.E.C.*, 187 F. 2d 804 (2nd Cir. 1951).

for the Court of Appeals for the Second Circuit, that the decision of that Court in the *Federal* case is wholly consistent with, and is in fact required by, this Court's decisions in the *Engineers* and *Otis* cases, and that, therefore, this Court should conclude that there is no occasion for the issuance of a writ in that proceeding.

In any event, even the single question to which petitioner points is not identical in both cases. As petitioner admits, in the *Federal* case an issue is presented as to the impact of a charter liquidation provision where the Company did, in fact, liquidate pursuant to State law. In the instant case, concededly there was no liquidation; there was no exercise of a charter provision under State law but merely a naked assertion on the part of petitioner that it could have exercised a charter right and probably would have (petitioner's brief, p. 14). As to both of these assertions the Commission and the District Court found against petitioner—thus no identical question of law exists in both cases, and, therefore, the issuance of a writ prior to judgment by the Court of Appeals is unwarranted on that ground.

Even if a common question of law be presumed to be presented to a limited extent, there are two particular reasons why that should not lead to short-circuiting the Court of Appeals in the present instance. Both reasons are based upon fundamental principles of judicial economy.

The first is that there are at least three additional questions presented by petitioner, not claimed by it to have any identity with the *Federal* case, which would compel this Court to undertake the consideration and decision of very complicated and factual matters, having nothing whatsoever to do with the *Federal* case and which in any event should be reviewed by the Court of Appeals in the first instance.

Thus, the second and third questions presented by petitioner relate to detailed determinations made by the Commission as to the investment value of Bond and Share's $6 preferred stock. Further, petitioner announces its intention (petitioner's brief, pp. 32-33) to argue before this Court, if the present petition is granted, the entire and all-comprehensive question of whether the findings of the Commission respecting the investment value of the $6 preferred stock are supported by substantial evidence on consideration of the record as a whole. Obviously, the foregoing questions are mainly factual, and are unique to the Bond and Share situation and in no way concern the *Federal* case since different companies and different stocks are involved.

The truth is that petitioner can have little hope of winning on its "charter argument" (which argument the District Court adequately disposed of in its opinion). What petitioner really seeks is to tie this case to the *Federal* case by urging that the charter argument is identical, and then, if a writ is obtained, to argue before this Court the investment value findings of the Commission and whether there was substantial evidence to support them. Respondents do not claim that petitioner has no right to appeal the District Court's decision on those primarily factual points. The position of the respondents, however, is that the petitioner clearly should take its appeal on those points first to the Court of Appeals.

The second particular reason why the Court of Appeals should not be short-circuited in the present instance is that there is another appeal now pending in that Court in this very case. That other appeal, an appeal by holders of $5 Preferred Stock Certificates, will require consideration by the Court of Appeals of the identical record which is now filed in this Court by petitioner. If a writ is sought from that determination by the Court of Appeals, this Court

will have before it for a second time the same record that it is now requested to consider. As a consequence, the grant of the instant application for a writ prior to judgment by the Court of Appeals will not result in the avoidance of "further futile proceedings" below (*Stainback* v. *Mo Hock Ke Lok Po, supra,* at p. 371). On the contrary, it can only occasion a wasteful duplication of judicial effort by causing a consideration of a single case in the Court of Appeals and in this Court at one and the same time, with a very real possibility of a subsequent and otherwise unnecessary reconsideration by this Court of the same record.

## POINT II

### The principal questions that petitioner asserts to be presented are in fact not posed by the record.

Respondents submit that the writ should be denied for the additional reason that an examination of the opinions of the Commission and the District Court discloses that the principal questions as propounded by petitioner are not, in fact, presented, and that the issues actually presented are of no general importance but are only of significance to these particular parties and in this particular litigation.

The petitioner asserts that the first question presented* is the legal issue as to whether it conforms to the fair and equitable standards of Section 11(e) of the Act to accord the preferred stockholders an amount which exceeds the liquidation preference stated in the charter, where a company, under its charter, could have and also probably would have retired its preferred stocks under the liquidation provision in its charter.

* The only one it urges as common with any of the questions presented in the *Federal* case (*supra*, pp. 4-5).

Whatever academic interest this question may have,* it is not one that is here presented. Before that question could be properly raised, it would be necessary for the Commission and the District Court to have found that Bond and Share could have and probably would have retired its preferred stocks under the liquidation provision in its charter, but, that, nevertheless, the fair and equitable standards of Section 11(e) of the Act required that the preferred stockholders be paid an amount exceeding that liquidation preference.

However, and just to the contrary, the District Court found that the liquidation provision could not have been invoked in this situation to retire the preferred (R. 9), and the Commission found that in any event the preferred probably would not have been retired, absent the compulsion of the Act (R. 53-54). It is not of present moment whether or not those conclusions of the District Court and Commission were correct (we demonstrate, post, p. 12, that they were correct). The important point is that clearly this Court should refuse to review questions as to whether the District Court properly construed Bond and Share's charter under applicable State law, and whether the Commission properly found that, absent the Act, Bond and Share would not, rather than it would, have retired its preferred stocks. These issues, involving as they do merely the determination of the narrow question of the construction of a corporate charter under the New York Stock Corporation Law, and the equally narrow and purely factual issue of what a company probably would or would not have done as a matter of business policy, are clearly issues of no general importance but only of significance to these particular parties and in this particular litigation. Under such circumstances, it is settled that this Court will not grant

* We demonstrate (*post*, pp. 10-11) that the question has been fully answered by this Court's opinions in the *Engineers* and *Otis* cases.

certiorari. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

So, too, with the second question sought to be presented. Petitioner urges that there is a legal issue raised by the record as to whether it was proper and consistent for the Commission, in determining the investment value of the $6 preferred stock, to give recognition to reorganizations of subsidiary companies under the Act, when the evidence is clear that, but for the Act, a reorganization of the subsidiaries would have been impossible (petitioner's brief, pp. 3, 29-31). If the evidence were clear, and if the Commission, in recognition thereof, had held that nevertheless the impact of the Act on the subsidiaries must be taken into consideration, its determination would still have been wholly in accord with the opinion of this Court in the *Engineer's* case. (We discuss this post, p. 14). But, again, that question is not presented.

The Commission nowhere held that these reorganizations would never have taken place but for the Act. On the contrary, the evidence in the record is to the effect that the reorganization of these subsidiaries would have taken place absent the Act. So petitioner's own expert testified at the hearings (R. 392). Whether this evidence should have been accepted or whether subsequent inconsistent testimony tendered by petitioner (R. 369) was entitled to greater weight is clearly not an issue of sufficient public importance to warrant review by this Court. In any event, the legal question, as stated by the petitioner, is not before the Court.

The third question petitioner wishes to propound is whether, within the prohibition of this Court's opinion in the *Engineers* case, the Commission employed as a standard a period of abnormally high market values of a transient nature (petitioner's brief, pp. 3, 31-32). Admittedly, the

period employed by the Commission was that prevailing between November, 1945 and March, 1947, a period of almost a year and a half. A period so extensive does not factually support submission of a purported legal question as to whether the Commission could properly use as a standard an abnormally high market value of a "transient" nature.

The fourth question is properly in the case, though here petitioner chooses to describe as "interest" what the Commission has more properly characterized as "compensation for delay" (R. 81). But, as we demonstrate hereafter, this is the identical question that was previously before this Court in the *Engineers* case, and the determination of the Commission herein follows and is consistent with the holding of this Court there.

## POINT III

**In any event, the questions presented are settled against petitioner by this Court's decisions in the *Engineers* and *Otis* cases.**

### A

In the *Engineers* and *Otis* cases, this Court held that the measure of a preferred stockholder's claim in a reorganization under Section 11 of the Act is the fair investment value of his preferred stock on a going concern basis.

In the *Engineers* case this Court stated expressly that investment value and not charter rights is the constant, and only to the extent that the charter right affects investment value is it to be given consideration:

> "* * * charter provisions have been held invariably not to be determinative."

> "* * * investment values rather than charter provisions provide the measure of the preferred stockholders' rights."*

Nevertheless, Bond and Share urges (Point I) that charter provisions and not investment value are here controlling. It argues that it could have effected a "distribution of capital" of $100 per share to the preferred stockholders under its charter and, consequently, that that amount is the limit of fair and equitable treatment under the Act.

The sole basis for this contention is that in the *Engineers* case, this Court, in mentioning that the redemption provision is the ceiling to which a preferred stockholder is entitled, gave as a reason that "the Company could have called the stock at that price at any time absent the Act" (petitioner's brief, p. 16). Bond and Share, taking the "could" out of its context, urges that wherever a charter provision "could" be employed, that provision represents the maximum allowable payment.

It is clear, however, that where a company can call its preferred and it is a security of such investment quality that, absent the call limitation, it would sell at a price in excess of call, a company that has the power to call would do so and refund. It will do so, for, by hypothesis, it can acquire a like amount of preferred capital at a lower dividend cost. Hence, the market value of such a security will not rise above that call price. The Commission, in recognition of this fact, has made the call price the effective ceiling in determining investment value. It is this practice of the Commission which the Court was referring to and approving in the statement from the *Engineers* case relied on by Bond and Share.

Thus, when this Court used "could" in the *Engineers* case in connection with redemption provisions, there was

* 338 U. S. at 131, 134.

an implicit recognition that the Company, under such circumstances, "would" call the stock. On the other hand, charter liquidation provisions that only "could" have been invoked, but lack the implicit "would", do not have a comparable effect on investment value. Such provisions can only be given weight if liquidation would have occurred for business reasons, wholly apart from the Act; otherwise, they can have no legitimate impact upon investment value.

To meet this difficulty, Bond and Share urges (petitioner's brief, Point II) that it "would" have made a distribution of capital in retirement of its preferred, even if the Act had not compelled that retirement. The short and simple answer is that the Commission found the contrary, and did this on the basis of the testimony of the chief executive officer of Bond and Share that "if I were not under the impact of the Holding Company Act, I would keep this money, keep the preferred stock out, and would find use for it profitably" (R. 53, 54, 377).

In its Point III, Bond and Share argues that under its charter it could have retired its preferred stocks by a "distribution of capital" of $100 per share. We have noted supra (pp. 10-11) that what Bond and Share "could" have done under its charter is irrelevant since the measure of fair and equitable treatment of the preferreds is the investment value of that security. Moreover, the District Court held that, under its charter liquidation provision, Bond and Share could not have effected this result. Assuming that the propriety of that determination is one for present consideration, it is readily demonstrable that the holding below is sound.

The District Court properly held that the "distribution of capital" provision in the charter had reference only to a situation in which there was at least "some payment or distribution to the common," and that adoption of Bond and Share's interpretation of the provision would render meaningless the redemption provision of the charter. As

a matter of construction, it is clear that the phrase "distribution of capital" can only refer to a distribution in connection with a liquidation (*People of Colorado* v. *Great Western Sugar Co.*, 29 F. 2d 810 (8th cir. 1928).

Bond and Share claims it could have retired its preferred stock, absent the Act, by a "distribution" of $100 per share, by utilizing the mechanics of either Sections 36 or 105 of the New York Stock Corporation Law. Since under Section 36 the preferred stock would clearly be a class "adversely affected", the consent of the holders of two thirds of such stock would be required (Section 37, New York Stock Corporation Law). Further, any dissenting preferred stockholder would be entitled to have his stock appraised and upon such appraisal to receive its fair investment value (*Matter of Fulton*, 257 N. Y. 487, 495). Thus, the very standards established by this Court in the *Otis* and *Engineers* cases, *i.e.*, "fair investment value", is the measure of such a dissenting stockholder's claim under New York law. As to Section 105, which deals with voluntary dissolution, since the common stockholders have not voted for such dissolution and do not propose to do so, it has no relevancy.

**B**

Bond and Share complains in its Point IV (petitioner's brief, pp. 29-31) that, in determining the investment value of the preferred stock, the Commission gave effect to reorganizations of subsidiary companies that could only have been accomplished under the Act. Petitioner contends that this violates the rule laid down by this Court in the *Engineers* case that investment value is to be determined without reference to the present liquidation or reorganization required by the Act.

We have noted (*supra*, p. 9) that the Commission did not find that the subsidiary reorganizations would only

have taken place under the Act and, furthermore, that petitioner's own expert testified that such reorganizations would have taken place had there been no Act.

However, even if the Commission had given effect to reorganizations of subsidiary companies that could have only taken place under the Act, in doing so, quite obviously it would not have violated the rule of the *Engineers* case. The statement by this Court that investment value is to be determined without reference to the present liquidation was an assertion that in determining fair and equitable treatment to a particular class, the measure of its worth is to be determined by investment or going concern value. Under the standard in the *Engineers* case, Bond and Share is to be considered as a going concern. But as a going concern it holds portfolio securities, the stocks of its subsidiaries, and to the extent that the value of these portfolio securities will be affected by the impact of the Act on the subsidiaries, recognition must be given thereto in determining the going concern value of Bond and Share itself. Further elaboration is unnecessary in view of the District Court's able consideration and disposition of this untenable claim (R. 11-12).

## C

Petitioner's contention that the Commission erred, as a matter of law, in basing its investement value appraisal on the stock yield levels prevailing between November, 1945, and March, 1947, in that that was a period of abnormally high market values of a transient nature, finds its refutation, as we noted previously, in the mere statement of the proposition. There is nothing transient about market levels prevailing for a period of a year and a half. Moreover, this Court in the *Engineers* case accepted as the proper measure market values in January, 1946, a date

within the period of which Bond and Share now complains; and the Court of Appeals for the Third Circuit in *In re Pennsylvania Edison Co.*, 176 F. 2d 764, rejected a similar contention and accepted as an appropriate date June 30, 1946, again within the same period.

## D

Petitioner finally urges that, in any event, the Commission should not have awarded to the preferred stockholders compensation for delay in payment at the annual rate of 5.45% (petitioner's brief, pp. 33-36). That rate was arrived at as a result of the Commission's conclusion that the investment value of the $6 preferred stock on the date it was retired was $110 per share and that, therefore, the preferred stockholders were entitled to that sum as of that date. Instead, as of that date, they received $100, or 10/11ths of their participating interest in the enterprise. Their participation entitled them to a return of $6, and $6 on a claim of $110 represents a return of 5.45%. To the extent that the shareholders did not receive the measure of their full participation, they are entitled to a continued return on the unpaid balance thereof.

This was the identical procedure followed by the Commission in the *Engineers* case, and that determination of the Commission was affirmed by this Court. Petitioner contends that the propriety of the compensation in the *Engineers* case was there challenged by the preferred stockholders on the ground that it was inadequate, while here it is challenged by common stockholders on the ground that it is excessive (pp. 35-36). The fact nevertheless remains that, under challenge, this Court found that payment proper, and its ruling to that effect was deemed controlling, when challenged by common stockholders, by the Court of Appeals for the Third Circuit in *In re Pennsylvania Edison Company, supra*, by a District Court in the First Cir-

cuit in *In re New England Public Service*, 94 F. Supp. 343, as well as the Court of Appeals for the Second Circuit in the *Federal* case, *supra*.

## Conclusion

There is no important public question involved in this case. The decision of the District Court is in accord with the decisions in the Second Circuit and in the other circuits—there is no conflict. Therefore, and for the additional reasons stated, i. e., (a) a writ should not, because of the particular circumstances here involved, issue prior to consideration by the Court of Appeals, (b) the principal questions posed are not presented by the record, and (c) even as posed, the questions have been previously resolved by this Court, these respondents respectfully pray that the petition for a writ of certiorari be denied.

Dated: May 21, 1951.

Respectfully submitted,

PERCIVAL E. JACKSON,
*Counsel for William F. Stuberfield, et al.*

PERCIVAL E. JACKSON,
THEODORE N. TARLAU,
*Of Counsel.*

FRANKLIN S. WOOD,
*Counsel for Alfred B. Cornell, et al.*

HAWKINS, DELAFIELD & WOOD,
JOHN F. B. MITCHELL, JR.,
*Of Counsel.*

A. FAIRFIELD DANA,
*Counsel for John Hancock Mutual Life Insurance Company.*

DEBEVOISE, PLIMPTON & McLEAN,
*Of Counsel.*

# APPENDIX

## Section 11(e).

Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. 79k(e)] reads as follows:

"Sec. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may so constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Office Supreme Court, U. S.
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MAY 31 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## REPLY BRIEF FOR THE PETITIONER.

JOHN F. MACLANE,
*Counsel for Petitioner.*

SIMPSON THACHER & BARTLETT,
120 Broadway,
New York 5, N. Y.,
*Of Counsel.*

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## REPLY BRIEF FOR THE PETITIONER.

### I.

The brief for the Securities and Exchange Commission (the Commission) in opposition to the granting of the present petition concedes the principal point in the petition. This point is that the primary legal issues in the present case and in the *Federal* case are similar, if not identical. The language of the Commission's brief in this connection is

> "We agree that there is a close relationship between the primary legal issues in the two cases."

This concession by the Commission is entirely consistent with the fact that the Commission withheld its decisions in the present case and in the *Federal* case for over two years and then handed down its orders determining the two cases on the same day.

Contrary to contentions of certain of the respondents, "judicial economy" dictates that the petitioner be relieved of going through appellate proceedings in the Court of Appeals for the Second Circuit in the present case, which would likely be futile in the light of that Court's recent position on similar issues in the *Federal* case. This Court should review the two cases simultaneously in the interest of economizing the time of everyone involved.

## II.

The primary legal issue common to the present case and the *Federal* case involves the effect which should be given to charter "liquidation" provisions upon the retirement of preferred stocks of companies subject to the Public Utility Holding Company Act of 1935 (the Act) in situations where, although such retirement was effected as a part of a liquidation or distribution of capital consummated by the Company in connection with plans filed with the Commission under Section 11(e) of the Act, the liquidation or distribution of capital could have been, and indeed probably would have been, carried out without the aid or compulsion of Section 11.

In its brief in opposition to the petition filed in the *Federal* case, the Commission fully argues its position that this Court in the *Engineers* case has in effect already decided the primary legal issues common to the *Federal* case and the present case. In its argument the Commission entirely overlooks the language of the opinion of this Court in the

*Engineers* case (quoted in our petition, p. 16), to the effect that a charter provision which could be called into play absent the Act must be considered as the ceiling on the claims of preferred stockholders under the "fair and equitable" federal rule of law. This principle, enunciated in the *Engineers* case, when applied to the different factual situations in the *Engineers* case and the present case, constitutes a vital distinguishing factor between the two cases. In fact, the decision of the District Court in the present case, as stated in our petition (p. 17), is inconsistent with the fundamental premise of the *Engineers* case that the impact of the Act should not result in a shifting of values from one class of security to another. Other distinctions between the *Engineers* case and the present case are pointed out in our petition at pages 13-18.

This Court should not be misled by statements made and inferences drawn, either wittingly or through inadvertence, in the briefs of respondents to the effect that factual, rather than legal, issues are presented to this Court by the petition. For instance, with respect to the primary legal questions regarding the effect of the charter "liquidation" provisions, we do not question the Commission's findings of fact (our petition, pp. 18-19, 22). We contend that wholly as a matter of law the Commission erred in not following its own previous rule exemplified by the *El Paso* case, and that such error, common to the present case and the *Federal* case, resulted in a decision by the Court of Appeals for the Second Circuit of a federal question in a way probably in conflict with applicable decisions of this Court or, at the very least, in a decision of an important question of federal law which has not been, but should be, settled by this Court.

We have pointed out (our petition, pp. 27-28) the manner in which the District Court in the present case

misapprehended questions of both law and fact in erroneously holding that the petitioner's charter "liquidation" provisions were not applicable. Such erroneous action by the District Court certainly should not prevent the petitioner from seeking a review by this Court of the District Court's decision along with other legal determinations made below.

## III.

The brief submitted on behalf of respondents (other than the Commission) argues that our petition should be denied because it presents to this Court, in addition to the primary legal issues which are common to the present case and the *Federal* case, other legal questions which we believe it is appropriate for this Court to determine. Such argument wholly lacks merit.

In the first place, even if it be assumed *arguendo*, that some of the legal issues presented to this Court by our petition are not identical to the issues presented by the petition in the *Federal* case, nevertheless such a situation should not form a basis for the denial of our petition. Once it is clear that the *primary* legal questions are common to the two cases, it is wholly consistent with judicial economy to request that while this Court is determining such major joint issues of law, it also decide ancillary issues in the same cases already before the Court.*

* In this connection your petitioner is not presently arguing the contention that the findings of the Commission respecting the investment value of the $6 preferred stock are not supported by substantial evidence on consideration of the record as a whole. On the contrary petitioner, in accordance with what we understand to be common practice before this Court, merely desires at the present time to reserve its right to press such a contention before this Court in the event that our petition is granted and in the event petitioner later determines that it is appropriate to argue the contention.

Moreover the additional legal issues in the present case are generally similar to those in the *Federal* case. For instance, Federal raises a legal issue as to the proper rule, in determining investment value, for the treatment of securities which the holding company will not have after consummation of the plan involved, and for the handling of the assumed return on cash which can only be invested under the stringent requirements of the Act. The petitioner raises substantially the same issue. Also, as respondents concede, issues respecting the question of the propriety of interest payments to the preferred stockholders involved are common to the two cases.

## IV.

The briefs for respondents seek, by divergent arguments, to advance some reason for denying the petition arising because of the fact that the representative of certain holders of the former $5 preferred stock of the petitioner has taken an appeal to the Court of Appeals for the Second Circuit from that part of the order of the District Court which affirmed the Commission's determination that the investment value of such $5 preferred stock did not exceed $100 per share, plus accumulated dividends.

We do not think that the appeal on behalf of the $5 preferred stock in the Court of Appeals should form a basis for denying our petition. In the first place, there is no reason to believe that the representative of the $5 preferred stockholders will ever petition this Court for review. Although such representative filed his notice of appeal to the Court of Appeals on April 20, 1951, we have heard nothing from him to indicate that he even means to prosecute that appeal.

In so far as the issues which might be raised on appeal by the representative of the $5 preferred stockholders are

the same as those presented to this Court by the present petition and consequently would be governed by the arguments contained in the present petition, such representative has been given an opportunity to refute our arguments. On April 26, 1951 we served him, together with the respondents in this proceeding, with the petition, brief and record on appeal, together with notice of filing thereof with this Court. The representative of the $5 preferred stockholders, however, has not seen fit to file a brief in opposition to our petition.

In so far as the issues which may be raised on behalf of the $5 preferred stockholders may be different from those presented to this Court in our petition, such issues arise in a separate appeal and should be considered as an entirely separate proceeding, the failure to prosecute which should not in any way prejudice or delay determination of the present petition on its own merits. In this connection it should be noted that the appeal of your petitioner is from an entirely different part of the District Court's order than the appeal on behalf of the $5 preferred stockholders.

## V.

In conclusion we will discuss briefly arguments made in the briefs of respondents relating to legal issues raised by our petition other than the primary charter issue. Under Point V of our petition we contend that the Commission and the District Court violated the opinion of this Court in the *Engineers* case by basing the investment value finding respecting your petitioner's preferred stocks on stock yield levels prevailing during a period of abnormally high market values of a transient nature. Respondents' briefs argue that the opinion of this Court in the *Engineers* case and the opinion of the Court of Appeals for the Third Cir-

cuit in the *Pennsylvania Edison Company* case are contrary to our contention, in that in both such cases the dates as of which the investment value appraisals were made fell within the period between November 1945 and March 1947 involved in the present case. The respondents fail to recognize the following factors which distinguish the *Engineers* and *Pennsylvania Edison* cases from the present case.

In the *Engineers* case this Court emphasized that no one disputed the expert testimony given by Dr. Badger at the Commission hearings to the effect that the period of preferred stock retirement there was not abnormal.* In the *Pennsylvania Edison* case the Court emphasized that the argument as to abnormality of market levels was not only never made before the Commission, but also that the Company insisted upon the date used in that case as a basis for the investment value appraisal. In the present proceeding, on the other hand, the record contains evidence (our petition; p. 32) that a severe change in preferred stock yields was definitely indicated during the period of retirement and consequently that preferred stock market prices might be expected to decrease, as they actually did beginning early in 1947.

Furthermore, the Commission's findings of investment value are intended to be long term appraisals which should not be predicated on market prices prevailing during such a relatively short period as November 1945 to March 1947, which at the time of the Commission's determination were recognized to have been abnormal.

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The briefs of the respondents take the position that this Court, in the *Engineers* case, held that 5.45% per annum was a proper rate of interest, or compensation for delay

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* Dr. Badger's testimony in this respect has been demonstrated by later events to be inaccurate.

in payment, to be paid to a holder of $6 preferred stock carrying an investment value of $110 per share. We have shown (our petition; pp. 35-36) that in the *Engineers* case this Court had before it for decision only the question of whether the interest allowed by the Commission was sufficient in amount to be fair to the preferred stockholders and that this Court never purported to decide whether the amount of interest might not be so large as to be unfair to the common stockholders.

The amount of interest here involved is very substantial, being more than $1,900,000, and continues to run each day at the rate of 5.45% per annum on more than $8,400,000. It is respectfully submitted that the legal issues respecting the propriety of the interest payments to the preferred stockholders should be determined by this Court rather than relegated to the Court of Appeals for the Second Circuit which, it is claimed by certain of the respondents in the present case, has already decided this legal question in the *Federal* case in a manner adversely to the contentions of your petitioner in the present case.

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WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit and that a hearing upon and determination by this Court of the matters presented in the petition and briefs of your petitioner be had.

Dated, May 31, 1951.

Respectfully submitted,

JOHN F. MACLANE,
Counsel for Petitioner.

SIMPSON THACHER & BARTLETT,
Of Counsel.